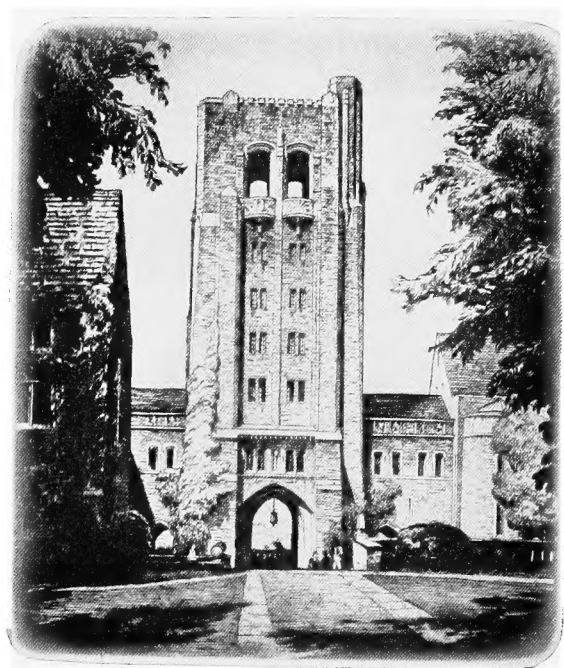


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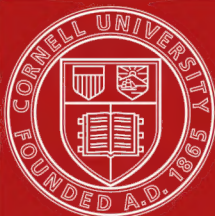
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LAW  
OF  
MANDAMUS.

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BY  
S. S. MERRILL  
OF THE ST. LOUIS BAR.

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## DEDICATION.

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THIS BOOK IS DEDICATED TO THE MEMORY OF MY BROTHER,  
WILLIAM E. MERRILL,  
LATE LIEUTENANT-COLONEL, CORPS OF ENGINEERS, UNITED STATES ARMY,  
WHO ORIGINATED AND CONSTRUCTED THE MOVABLE DAM ACROSS  
THE OHIO RIVER NEAR PITTSBURGH, PA., AND WHO FOR  
THE LAST TWENTY YEARS WAS IN CHARGE OF THE  
GOVERNMENTAL WORK ON THE OHIO RIVER.



## PREFACE.

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The law of *mandamus* has gradually grown up under the guidance of judicial discretion, which has produced such varying decisions from the numerous courts of last resort, that it is expedient from time to time to collect the law on this subject, both to assist the practicing attorney relative to the application of the writ in new questions presenting themselves from time to time, and to aid the courts in harmonizing their views of judicial discretion.

In preparing this volume the author has himself carefully examined every decision therein cited, and his readers may safely rely on the correctness of such citations. Of course it is admitted that the exercise of the greatest care does not render an error an impossibility.

This work is now committed to his professional brethren in the hope that Job's wish, that his enemy would write a book, is not advice which should have been heeded by its author.

S. S. MERRILL.

ST. LOUIS,  
May, 1892.





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 Walls v. Palmer, 64 Ind. 493. §§ 195, 216.  
 Walter v. Belding, 24 Vt. 658. § 24, 154.  
 Walter Brothers, 89 Ala. 237. § 189.  
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 Washington University v. Green, 1 Md. Ch. 97. § 43.  
 Washoe Co. (Com'rs) v. Hatch, 9 Nev. 357. §§ 55, 155.  
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 Wheelock v. Auditor, 130 Mass. 486. § 53.  
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     v. Judge, 27 Mo. 225. § 51.  
     v. Mutual Gas Co., 52 Mich. 499. § 27.  
     v. Saunders, 5 Cold. 60. § 189.  
     v. Smith, 6 Cal. 91. § 123.

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| <p>Williamsburgh (Trustees). In re, 1 Barb. 34. §§ 53, 284.</p> <p>Williamsport (City) v. Commonwealth, 90 Pa. St. 498. §§ 61, 62, 129, 132, 135.</p> <p>Winstanley v. People, 92 Ill. 402. § 242.</p> <p>Winston v. Moseley, 35 Mo. 146. §§ 105, 153.</p> <p>Winter v. Baldwin, 89 Ala. 483. § 161.</p> <p>Winters v. Burford, 6 Cold. 328. §§ 13, 57, 123, 256.</p> <p>Wintz v. Board of Education, 28 W. Va. 227. §§ 31, 115.</p> <p>Wise v. Bigger, 79 Va. 269. §§ 109, 228, 230, 270.</p> <p>Withers v. State, 36 Ala. 252. §§ 195, 255, 305.</p> <p>Woffenden, In re, 1 Ariz. 237. §§ 21, 30.</p> <p>Wolfe v. McCaull, 76 Va. 876. § 109.</p> <p>Wolff v. New Orleans, 103 U. S. 358. § 20.</p> <p>Wood v. Farmer, 69 Iowa, 533. § 77.</p> <p style="padding-left: 2em;">v. Strother, 76 Cal. 545. §§ 47, 313.</p> <p>Woodbury v. County Com'rs, 40 Me. 304. § 77.</p> | <p>Woodruff, Ex parte, 4 Ark. 630. § 297.</p> <p>Woodruff v. New York, etc. R. R., 59 Conn. 63. §§ 246, 274.</p> <p>Worcester v. Schlesinger, 16 Gray, 166. § 34.</p> <p>Wormwell v. Hailstone, 6 Bing. 668. § 19.</p> <p>Wren v. Indianapolis (City), 96 Ind. 206. § 237.</p> <p>Wright v. Fawcett, Burr. 2041. §§ 276, 277.</p> <p style="padding-left: 2em;">v. Johnson, 5 Ark. 687. §§ 189, 273.</p> <p style="text-align: center; padding: 10px 0;">Y.</p> <p>Yeager, Ex parte, 11 Gratt. 655. § 119.</p> <p>York v. Ingham, 57 Mich. 421. § 200.</p> <p>York, etc. R. R. v. Queen, 1 El. &amp; Bl. 858. § 159.</p> <p>Yost v. Gaines, 78 Tenn. 576. § 228.</p> <p>Younger v. Supervisors, 68 Cal. 241. § 37.</p> <p style="text-align: center; padding: 10px 0;">Z.</p> <p>Zanone v. Mound City, 103 Ill. 552. § 40.</p> |
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# MANDAMUS.

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## CHAPTER 1.

### DEFINITION AND HISTORY OF THE WRIT OF MANDAMUS.

- § 1. Definition of the writ of *mandamus*.
- 2. Origin of the writ.
- 3. The writ is a common-law writ.
- 4. Formerly no traverse was allowed.
- 5. When a traverse was allowed to the return.
- 6. English common law as adopted in America.
- 7. Statute of Anne adopted.
- 8. Extension of the writ in England.
- 9. Uncertainty as to the limits of its use.

§ 1. Definition of writ of mandamus.—A writ of *mandamus* is defined to be a command, issuing in the king's name from the court of king's bench, and directed to any person, corporation, or inferior court of judicature within the king's dominions, requiring them to do some particular thing, therein specified, which pertains to their office and duty, and which the court of king's bench has previously determined, or at least supposes, to be consonant to right and justice.<sup>1</sup> It is also said that a writ of *mandamus* is directed to some person, corporation, or inferior court, requiring them to do some particular thing, therein specified, which appertains to their office or duty, and which is supposed to be consonant to right and justice, and where there is no other adequate specific remedy.<sup>2</sup> Lord Mansfield said: Where there is a right to execute an office, perform a service or a function, or exercise a franchise (more especially if it be a matter of public concern or attended with profit),

<sup>1</sup> 3 Black. Com. 110.

<sup>2</sup> Kendall v. United States, 12 Pet. 524.

and a person is kept out of possession or dispossessed of such right, and has no other specific legal remedy, this court ought to assist by a *mandamus*, upon reasons of justice, as the writ expresses, and upon reasons of public policy, to preserve peace, order and good government.<sup>1</sup> The statutory definition adopted by a number of states is that the writ runs to an inferior tribunal, board, corporation or person to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station.<sup>2</sup>

§ 2. **Origin of the writ.**—The writ of *mandamus* was issued as early as the fourteenth and fifteenth centuries.<sup>3</sup> Then it was a mere letter missive from the sovereign power, commanding the party to whom it was addressed to perform a particular act or duty. No return to it was allowed, and disobedience thereof was punished by attachment. At length it obtained the sanction of an original writ, and was issued from the court of king's bench, where the king once presided, and where in fiction of law he is always present. It was, however, rarely used till the latter part of the seventeenth century.

§ 3. **The writ of mandamus is a common-law writ.**—The writ has been issued from a court of chancery,<sup>4</sup> but such practice has been long since abandoned, and it is now issued only out of a common-law court,<sup>5</sup> and is considered to be exclusively a common-law remedy,<sup>6</sup> with which equity has nothing to do.<sup>7</sup> A court of equity cannot issue an injunction to stay proceedings by *mandamus*, since the writ is not remedial but mandatory, and issues from a superior court

<sup>1</sup> *Rex v. Barker*, 3 Burr. 1265.

<sup>2</sup> *State v. Gracey*, 11 Nev. 223; *Boggs v. C.*, B. & Q. R. R., 54 Iowa, 435; *Fremont v. Crippen*, 10 Cal. 211.

<sup>3</sup> *R. v. Cambridge University*, Fort. 202; *Rex v. Dr. Gower*, 3 Salk. 230.

<sup>4</sup> *Coventry (Mayor)*, Case of, 2 Salk.

429; *Rioter's Case*, 1 Vern. 175; *Crane, Ex parte*, 5 Pet. 190.

<sup>5</sup> By statute in some states a chancery court can issue the writ.

<sup>6</sup> *Heine v. Levee Commissioners*, 19 Wall. 655; *Chumasero v. Potts*, 2 Mont. 242; *State v. Burnsville T. Co.*, 97 Ind. 416.

<sup>7</sup> *Gay v. Gilmore*, 76 Ga. 725.

of common law, which has great latitude and discretion in such cases, and can judge of all the circumstances, and is not bound by such strict rules as in the case of private rights.<sup>1</sup>

§ 4. **Formerly no traverse was allowed to the return.**—Formerly no traverse was allowed to the return to the rule to show cause why a *mandamus* should not issue, or to the alternative writ, which ordered performance of the act or to show cause why the act should not be done. If the return showed a sufficient legal reason for not doing the act, the writ was refused. The only remedy open to the petitioner was to bring an action for damages for a false return. If the petitioner prevailed in such action, the peremptory writ of *mandamus* was issued at once.

§ 5. **When traverse allowed to the return.**—By the statute of 9th Anne (ch. 20) a traverse of the return was permitted in cases where the contest was for municipal office, and by the act of 1 Wm. IV. (ch. 21) a traverse of the return was permitted in all cases, thus dispensing with the necessity for an action for a false return.

§ 6. **English common law as adopted in America.**—The states of the American Union have adopted the English common law, but generally of a period when the writ of *mandamus* had been but little used, and the principles governing its issuance had not been formulated. The period selected was generally the early part of the reign of James I., just prior to the settlement of Jamestown, Virginia. This period is prior to the occurrence of *Bagg's Case*, which has often, though erroneously, been considered to be the first case wherein a *mandamus* was issued.<sup>2</sup> The common law is generally accepted as binding upon this country as it existed prior to the beginning of the fourth year of the reign of James I. He ascended the English throne March 24, 1603.

<sup>1</sup> Lord Montague v. Dudman, 2 R. v. Cambridge University, Fort. Ves. Sr. 396. 202; Widdrington's Case, 1 Levinz,

<sup>2</sup> Queen v. Heathcote, 10 Mod. 48; 23; R. v. Dr. Gower, 3 Salk. 230.

§ 7. Statute of Anne adopted.—However, the various states have enacted the statute of 9th Anne (ch. 20), amplified by allowing a traverse in all cases, or have adopted legislation of a similar nature.

§ 8. Extension of the writ in England.—In England statutes have been adopted allowing writs of *mandamus* under certain circumstances,<sup>1</sup> but those writs are distinguished from the ancient writ, which is called in England the prerogative writ of *mandamus*, and, in America, simply the writ of *mandamus*. The following pages will treat only of the latter writ as enforced in England and America.

§ 9. Uncertainty as to the limits of its use.—It will be seen that, from the generality of the definitions of the applicability of this writ, the courts may come to very different conclusions, in the various cases arising, as to the propriety of granting it. In Bacon's Abridgment it is said that it is hardly possible to fix any general rule as to when the writ will be granted, and the cases relative to contests for office are given without any attempt to reconcile them.<sup>2</sup> Blackstone does not even attempt to define the cases in which the courts have granted the writ. Like all rules of law which have been generally developed by the courts, its course has been attended with fluctuations of opinion. It has even been asserted that the courts have purposely left the matter open.<sup>3</sup>

<sup>1</sup>To examine witnesses in the English colonies: 13 Geo. III., and under the Judiciary act of 1873, by 1 Will. IV.; allowing writs of interlocutory order.

*mandamus* in nearly all civil ac- <sup>2</sup>Bacon's Ab., Title Mand. C.

tions: 17 and 18 Victoria; and <sup>3</sup>Att'y-Gen. v. Boston, 123 Mass. 460.

## CHAPTER 2.

### NECESSITY THE ORIGIN OF THE WRIT.

§ 10. No other remedy.

11. Remedy required where there is a right.

12. Increasing the uses of the writ.

**§ 10. No other remedy.**—Without this writ there are many wrongs which the law could not adequately redress. It was created to satisfy this exigency, but not to interfere with the ordinary administration of justice. Accordingly the reasons given for its issuance are: that there is no remedy provided by law for the wrong, but in justice and good government there ought to be a remedy;<sup>1</sup> because there is no other adequate remedy;<sup>2</sup> to prevent a defect of justice<sup>3</sup> and a defect of police;<sup>4</sup> to preserve peace, order and good government;<sup>5</sup> to prevent a failure of justice;<sup>6</sup> or because there is a right and no other remedy.<sup>7</sup> The right, coupled with the necessity of such a vindication of it, supports the jurisdiction to issue the writ.<sup>8</sup>

**§ 11. Remedy required where there is a right.**—It has been said that it would be a monstrous absurdity in a well-organized government that there should be no remedy,

<sup>1</sup> *Rex v. Barker*, 3 Burr. 1265; *In re Turner*, 5 Ohio, 542; *Hall v. Somersworth* (Selectmen), 39 N. H. 511; *Legg v. City of Annapolis*, 42 Md. 203.

<sup>2</sup> *Morley v. Power*, 73 Tenn. 691; *Durham v. Monumental S. M. Co.*, 9 Oreg. 41; *R. v. Cambridge* (Univ.), 1 W. Bl. 552; *State v. Stockwell*, 7 Kan. 98; *King v. Dublin* (Dean), 8 Mod. 27.

<sup>3</sup> *State v. Inferior Court* (Just.), Dud. (Ga.) 37; *Runkel v. Winemil-*

*ler*, 4 Harris & McH. 429; *R. v. Windham*, Cowp. 377.

<sup>4</sup> *Ex parte Trapnall*, 6 Ark. 9; *State v. Williams*, 69 Ala. 311; 3 *Stephen's Nisi Prius*, 2292.

<sup>5</sup> *Lewis v. Whittle*, 77 Va. 415.

<sup>6</sup> *People v. State Treas.*, 24 Mich. 468.

<sup>7</sup> *People v. State Treas.*, 24 Mich. 468; *People v. Allegan Circuit* (Judges), 29 Mich. 487.

<sup>8</sup> *Tawas, etc. R. R. v. Iosco Cir. Judge*, 44 Mich. 479.

although a clear and undeniable right should be shown to exist;<sup>1</sup> also, where a man has a *jus ad rem*, it would be absurd, ridiculous, and a shame to the law, if he could have no remedy, and the only remedy he can have is by *mandamus*.<sup>2</sup> This language cannot, however, be accepted in its full strength. "We receive and admit it as a common maxim that the law has a remedy for every wrong. But this we know means only a legal wrong, and therefore the proposition being turned around comes to nothing more than that there is no wrong where there is no remedy."<sup>3</sup> Again we must keep in mind that the existence of a right is always questionable when the wisdom of the law affords no adequate remedy on its violation.<sup>4</sup> Our effort will be to show how far the statement above may be accepted as correct.

§ 12. Increasing the uses of the writ.—Though the reasons given by the courts, which authorized the issuance of the writ of *mandamus*, as mentioned in the two prior sections, were no doubt potential with the courts before the principles governing this writ had crystallized into a system, yet at the present time the courts do not act on them so as to enlarge the scope of the writ, but only apply it in cases which fall under its rules by well-established precedent. Even in cases where the state law allows the writ to issue in all cases where it is necessary to prevent a failure,<sup>5</sup> or a denial,<sup>6</sup> of justice, the writer does not find that any effort has been made to enlarge the scope of the writ. It is considered to be a harsh remedy, and to be substituted for the ordinary process only in extraordinary cases, and laws extending its operations should be strictly construed.<sup>7</sup>

<sup>1</sup> Kendall v. United States, 12 Peters, 524.

<sup>2</sup> R. v. Montacute, 1 W. Bl. 64.

<sup>3</sup> Judges of Oneida C. P. v. People, 18 Wend. 79.

<sup>4</sup> Com. v. Cumberland C. P. Court (Judges), 1 S. & R. 187.

<sup>5</sup> Blair v. Marye, 80 Va. 485.

<sup>6</sup> State v. Young, 38 La. An. 923.

<sup>7</sup> State v. New Orleans, etc. R. R., 42 La. An. 138.

## CHAPTER 3.

### SCOPE OF THE WRIT OF MANDAMUS.

§ 13. The duties enforced by *mandamus*.

14. To compel production and inspection of public documents.
15. *Mandamus* as to property devoted to public use.
16. *Mandamus* not lie to enforce private contracts.
17. Writ not lie to compel payment of debts.
18. Exceptions as to collecting debts by this writ.
19. Exceptions continued.
20. Change of law as affecting *mandamus*.

§ 13. The duties enforced by *mandamus*. — A *mandamus* will issue to enforce obedience to acts of parliament and to the king's charters,<sup>1</sup> when it is said to be demandable *ex debito justitiæ*.<sup>2</sup> It will also issue to enforce obedience to the common law,<sup>3</sup> for the statute law is only intended to supply the deficiencies of the common law and to meet exigencies as they arise.<sup>4</sup> As otherwise said, the writ lies to compel the performance of an act which the law enjoins as a duty<sup>5</sup> resulting from an office, trust or station.<sup>6</sup> Whenever the law gives power to, or imposes an obligation on, a particular person to do some particular act or duty, and provides no other specific legal remedy for

<sup>1</sup> *R. v. Everet*, Cas. temp. Hard. 261; *King v. Wheeler*, Cas. temp. Hard. 99; *People v. State Treas.*, 24 Mich. 468; *Boggs v. C., B. & Q. R. R.*, 54 Iowa, 435; *Com. v. Allegheny Co. (Com'rs)*, 32 Pa. St. 218.

<sup>2</sup> Bacon's Ab., Title "Mand.;" <sup>3</sup> *Stephen's Nisi Prius*, 2291, 2292; *R. v. Clear*, 4 B. & C. 899; *R. v. Stafford*, 3 T. R. 646.

<sup>3</sup> *Stephen's Nisi Prius*, 2291, 2292; *People v. State Treas.*, 24 Mich. 468.

<sup>4</sup> *State v. Republican V. R. R.*, 17 Neb. 647.

<sup>5</sup> *Pittsburgh, etc. R. R. v. Com.*, 104 Pa. St. 583; *State v. Fuller*, 18 S. C. 246; *State v. Hagood*, 30 S. C. 519; *Supervisors v. United States*, 18 Wall. 71.

<sup>6</sup> *State v. Johnson*, 28 La. An. 932; *Crandall v. Amador Co.*, 20 Cal. 72; *State v. Republican R. B. Co.*, 20 Kans. 404; *Chumasero v. Potts*, 2 Mont. 242.



its performance, this writ will issue.<sup>1</sup> Such duties need not be specifically stated in the law. It is sufficient if they are imposed by implication from a fair and reasonable construction of the law.<sup>2</sup> Nor is it necessary that they shall be imposed by law on the individual in question, provided he has put himself in the position from which by law the duties accrue. Thus, common carriers, railroads, telegraph and telephone companies, in their business have assumed public functions which under the law may be enforced by *mandamus*.<sup>3</sup> A railroad which accepted the benefits of a tax authorized by law for its assistance was held liable to *mandamus* to enforce its obedience to obligations imposed upon it by that act.<sup>4</sup> This writ lies to enforce duties imposed by law, and neither a stipulation nor the agreement of the parties can change the uses or the extent of the writ of *mandamus*.<sup>5</sup>

**§ 14. To compel production and inspection of public documents.**—This writ will lie to enforce the production of every document of a public nature in which any citizen may prove himself to be interested;<sup>6</sup> but he must show that his interest is direct and tangible, and that his application is made in good faith on some special and public ground,<sup>7</sup> unless the law allows him an inspection thereof as a matter of right.<sup>8</sup> Such right, however, will not be enforced against one being proceeded against criminally.<sup>9</sup>

<sup>1</sup> *Mobile & O. R. R. v. Wisdom*, 5 Heisk. 125; *Winters v. Burford*, 6 Cold. 328.

<sup>2</sup> *Mobile & O. R. R. v. Wisdom*, 5 Heisk. 125; *Durham v. Monumental S. M. Co.*, 9 *Oreg.* 41; *People v. Green*, 64 *N. Y.* 499. It has been held, however, that they must be specifically imposed. *Freon v. Carriage Co.*, 42 *Ohio St.* 30.

<sup>3</sup> *State v. Nebraska Tel. Co.*, 17 *Neb.* 126.

<sup>4</sup> *Mobile & O. R. R. v. Wisdom*, 5 Heisk. 125.

<sup>5</sup> *Biggs v. McBride*, 17 *Oreg.* 640.

<sup>6</sup> *Lord Denman in R. v. Marylebone*, 5 *A. & E.* 276; *R. v. Tower Hamlets*, 3 *Q. B.* 670.

<sup>7</sup> *Briggs, Ex parte*, 1 *E. & E.* 881; *Harrison v. Williams*, 4 *D. & R.* 820; *Sage, In re*, 70 *N. Y.* 220; *R. v. Clear*, 4 *B. & C.* 899; *People v. N. P. R. R.*, 18 *Fed. Rep.* 471; *Colnon v. Orr*, 71 *Cal.* 43; *State v. Hollitzelle*, 85 *Mo.* 620; *State v. Williams*, 96 *Mo.* 13.

<sup>8</sup> *Rex v. Great Faringdon*, 9 *Barn. & Cres.* 541; *King v. Wilts, etc. Nav. (Prop'rs)*, 3 *A. & E.* 477.

<sup>9</sup> *King v. Cadogan*, 5 *B. & Ald.* 902.

Where, however, the law specified that the registration lists of voters should be at all times open to inspection, the court considered that the law had been passed to prevent fraud, and that it should be liberally interpreted. It was ruled, that any registered voter was not only entitled to inspect the lists, but also to take copies thereof, and in case such right was refused him, he could obtain redress by the writ of *mandamus*.<sup>1</sup>

### § 15. Mandamus as to property devoted to public use.

When one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use, but as long as he maintains the use he must submit to the control. In this category are included public warehouses, elevators, telegraph lines, telephones and other occupations which the legislatures have undertaken to control.<sup>2</sup>

### § 16. Mandamus not lie to enforce private contracts.—

Since the object of this writ is to enforce duties created by law, it will not lie to enforce private contracts,<sup>3</sup> unless it is extended to such cases by statutory enactment.<sup>4</sup> Where, however, the contract involves a public trust or official duty, the rule is otherwise, since that is one of the grounds for the issuance of the writ. No attempt has been made to define a duty resulting from a trust, but an examination of the authorities would lead to the conclusion that it comprehends no duty which is not imposed by law. The writ has been refused: to an employee against a public board

<sup>1</sup> Clay v. Bolland (Va. 1891), 13 South E. Rep. 262.

<sup>2</sup> Post, § 25.

<sup>3</sup> Benson v. Paul, 6 EL. & BL. 273; State v. Republican R. B. Co., 20 Kans. 404; People v. Dulaney, 96 Ill. 503; Tobey v. Hakes, 54 Conn. 274; State v. Salem Church (Trust-

ees), 114 Ind. 389; State v. Patterson, etc. R. R., 43 N. J. L. 505; State v. Einstein, 46 N. J. L. 479; Kennedy v. Board of Education, 82 Cal. 483.

<sup>4</sup> State v. New Orleans, etc. R. R., 42 La. An. 138.

for breach of contract;<sup>1</sup> to a contractor, who had contracted with the board of education for the deposit of its money with him, to compel its treasurer to make such deposit;<sup>2</sup> against the commissioner of public works, to compel the execution of a contract with the relator for which he had bid;<sup>3</sup> to enforce the contract of a county to pay for volunteers;<sup>4</sup> to make a railroad keep a street in repair as required by its contract with the city;<sup>5</sup> to the state to compel a company to keep a bridge in repair, which, in return for a grant of land by the state, it had contracted to do;<sup>6</sup> and to compel arbitrators to proceed under an arbitration agreement, which was a common-law arbitration, and not under the statute providing for its becoming a decree of the court.<sup>7</sup> The writ was refused to a board of county commissioners to compel a turnpike company to keep a bridge in repair as it had contracted with them to do.<sup>8</sup> Where one had contracted with a city, which refused to pay him, it was held that a *mandamus* would not lie to compel any officer to facilitate his payment by signing a warrant, and that the officers acted for the corporation, and owed him no duty.<sup>9</sup> It was sought by *mandamus* to compel a city to construct a public street, not yet opened, in a certain way, in accordance with a contract made with the relator, it being also alleged that such proposed construction was taken into consideration in assessing the relator's damages and benefits. The court held that the relator's rights rested wholly on a special contract, which involved no questions of public trust or official duty, and the writ was refused.<sup>10</sup> By its

<sup>1</sup> Portman v. Fish Commissioners, 50 Mich. 258.

<sup>2</sup> Board of Education v. Runnels, 57 Mich. 46.

<sup>3</sup> People v. Thompson, 99 N. Y. 641.

<sup>4</sup> State v. Howard Co., 39 Mo. 375.

<sup>5</sup> State v. New Orleans, etc. R. R., 37 La. An. 589.

<sup>6</sup> State v. Republican R. B. Co., 20 Kans. 404.

<sup>7</sup> People v. Nash, 47 Hun, 542. Where, however, by statute, the arbitration may become a rule of court, a *mandamus* may issue. See § 24.

<sup>8</sup> State v. Zanesville, etc. T. Co., 16 Ohio St. 308.

<sup>9</sup> People v. Wood, 35 Barb. 653.

<sup>10</sup> Parrott v. Bridgeport (City), 44 Conn. 180.

charter a railroad was allowed to build its line along a certain route, provided it first contracted with a cemetery company to build a wall where its line ran along the cemetery. The cemetery company asked for a *mandamus* to compel the railroad to build the wall which it had contracted to do. The court held that the railroad had complied with its charter duty in building its line, and that the contract could only be enforced by the usual means. The *mandamus* was refused, though the railroad had then become bankrupt.<sup>1</sup> It is immaterial on the question of *mandamus* what may be the form of the contract,<sup>2</sup> or that its execution,<sup>3</sup> or that its annulment,<sup>4</sup> is sought.

§ 17. Writ not lie to compel payment of debts.— Since this writ is intended for public rights, it does not lie merely to compel the payment of debts. It cannot be used to compel municipal authorities to pay the salaries due its officers, since a suit in *assumpsit* may be brought;<sup>5</sup> nor to recover moneys expended or misapplied by public officers, there being another remedy which is exclusive;<sup>6</sup> nor to compel a city to levy a tax to pay its bonds, which are questioned in law and in fact, till a judgment has been obtained thereon in the usual way;<sup>7</sup> nor to compel a mutual benefit association to levy an assessment to pay a death loss, where it denies all liability, till the question has been determined by a suit.<sup>8</sup> The form of the contract of a private association cannot confer jurisdiction on the court for a proceeding by *mandamus*;<sup>9</sup> nor can the stipulation or agreement of the parties change the extent or uses of the writ;<sup>10</sup> nor will the court extend the remedy to cases to

<sup>1</sup> State v. Patterson, etc. R. R., 43 N. J. L. 505.

<sup>2</sup> Burland v. Northwestern M. B. Assoc., 47 Mich. 424.

<sup>3</sup> People v. Thompson, 99 N. Y. 641.

<sup>4</sup> Detroit F. P. Co. v. Board of Auditors, 47 Mich. 135.

<sup>5</sup> State v. Hannon, 38 Kans. 593. See, however, ch. 12.

<sup>6</sup> Elder v. Washington Ter., 3 Wash. Ter. 438.

<sup>7</sup> State v. Manitowoc, 52 Wis. 423.

<sup>8</sup> Burland v. North West M. B. Assoc., 47 Mich. 424.

<sup>9</sup> Burland v. North West M. B. Assoc., 47 Mich. 424.

<sup>10</sup> Biggs v. McBride, 17 Oreg. 640.

which it does not apply, although the parties waive all objections thereto.<sup>1</sup>

**§ 18. Exceptions as to collecting debts by this writ.—**

There are, however, exceptions to the rule that a *mandamus* does not lie to compel the payment of debts. The writ will issue where a ministerial officer has money in his hands which it is his duty to pay to the party entitled to it under the law. The rule is, that a ministerial officer, who has in his hands a specific fund, may be compelled by this writ to make distribution of the fund.<sup>2</sup> It has been granted: to compel a ditch commissioner, who had collected assessments, levied for the construction of a ditch, to distribute to the contractor the amount due him for constructing the ditch;<sup>3</sup> to compel the adjustment of the account of the superintendent of a public asylum, whose salary was payable out of a particular fund, by the proper officer;<sup>4</sup> and to compel a railroad to pay to the county judge the damages assessed against it for taking land for its right of way, which land it was occupying.<sup>5</sup>

**§ 19. Exceptions continued.—**Where, however, a party is entitled to the payment of money, and there is no other way of collecting it, to prevent a failure of justice the writ of *mandamus* has been allowed to enforce a duty imposed by law on public officers or corporations.<sup>6</sup> There being no other remedy the writ was allowed: against a company to compel payment for land taken for their water-works;<sup>7</sup> to collect the sum awarded by a jury for land taken by the harbor commissioners under a statute;<sup>8</sup> and to cause compensation to be made out of general or special taxes for

<sup>1</sup> Lord Campbell in *Reg. v. Treasury*, 15 Jur. 767.

<sup>2</sup> *Ingerman v. State* [Ind., May 1, 1891], 27 North E. Rep. 499; *Illinois State Hospital v. Higgins*, 15 Ill. 185; *State v. Wabash, etc. Canal (Trustees)*, 4 Ind. 495.

<sup>3</sup> *Ingerman v. State*, *supra*.

<sup>4</sup> *Illinois State Hospital v. Higgins*, 15 Ill. 185.

<sup>5</sup> *State v. Grand Island R. R.*, 27 Neb. 694.

<sup>6</sup> *R. v. St. Katherine Dock Co.*, 4 B. & Ad. 360; *Wormwell v. Hailstone*, 6 Bing. 668. See § 130.

<sup>7</sup> *King v. Nottingham O. W. W.*, 6 A. & E. 355.

<sup>8</sup> *Q. v. Swansea Harbor (Trustees)*, 8 A. & E. 439.

damages sustained in making certain public improvements.<sup>1</sup> The law authorized the president of a bank to retain from its dividends or profits a sufficient sum of money to meet the taxes levied on its stock and to pay the money to the state. The other property of the bank was exempt from taxation. The state had no other remedy, and had no lien, and no action against any one. The writ was issued to compel the president of the bank to pay over the money.<sup>2</sup> The liability of a railroad company for taxes assessed against it was affirmed in the supreme court. The railroad had been leased to a foreign company, which had agreed to pay to the stockholders interest on their stock. There being no other remedy, a *mandamus* was issued to compel the payment of these taxes.<sup>3</sup> Where the funds of a school board were held by a city treasurer and paid out by him on drafts issued by the school board, a creditor of the latter was allowed by a *mandamus* proceeding to prove up his claim and to obtain an order for the school board to issue to him a draft on the city treasurer for the amount found to be due to him.<sup>4</sup>

§ 20. Change of law as affecting *mandamus*.—By the provisions of the United States constitution no state can pass a law impairing the obligation of a contract. This obligation includes the means provided by law to compel a compliance with the provisions of the contract. When a public corporation possessing a power to levy taxes to pay its debts enters into a contract whereby it incurs a debt, and a law is subsequently passed which takes away or substantially impairs such taxing power, such law is void as to such contract, and the creditor on default of payment may by *mandamus* compel the corporation to levy a tax under the old law for the purpose of paying the debt due him, provided there is no other adequate and specific remedy.<sup>5</sup>

<sup>1</sup> Q. v. Wallasey Board of Health, 10 B. & S. 428.

<sup>2</sup> State v. Mayhew, 2 Gill, 487.

<sup>3</sup> Person v. Warren R. R., 32 N. J. L. 441.

<sup>4</sup> Raisch v. Board of Education, 81 Cal. 542.

<sup>5</sup> Wolff v. New Orleans, 103 U. S. 358; Ralls Co. v. United States, 105 U. S. 733; Von Hoffman v. Quincy

When such law, though to some extent changing the remedy, does not impair the obligation of the contract, it will be applied to such contract.<sup>1</sup> Even the right to a writ of *mandamus* may be taken away without any violation of the constitution of the United States or of the state, provided an adequate and efficacious remedy be left.<sup>2</sup> When, on the other hand, a subsequent law gives other and additional means for enforcing the obligation of a contract, as by subjecting other property to a liability therefor, or by increasing the power of taxation, the party interested may avail himself thereof.<sup>3</sup>

- (City), 4 Wall. 535; *State v. Rahway* (Assessors), 43 N. J. L. 338; *Assessor of Taxes v. State*, 44 N. J. L. 395; *Rees v. Watertown (City)*, 19 Wall. 107; *Louisiana v. Pilsbury*, 105 U. S. 278; *Duperier v. Iberia Parish (Police Jury)*, 31 La. An. 709; *Canova v. State*, 18 Fla. 512; *Columbia County (Com'rs) v. King*, 13 Fla. 451; *United States v. Lincoln County (Just.)*, 5 Dill. 184.
- <sup>1</sup> *Antoni v. Greenhow*, 107 U. S. 769.
- <sup>2</sup> *Poindexter v. Greenhow*, 84 Va. 441.
- <sup>3</sup> *Cape Girardeau County Court v. Hill*, 118 U. S. 68; *Clay County v. McAleer*, 115 U. S. 616; *United States v. Galena (City)*, 10 Biss. 263.

## CHAPTER 4.

### HOW FAR THE WRIT IS CONFINED TO PUBLIC RIGHTS AND AGAINST PUBLIC OFFICERS.

- § 21. Is the writ confined to public rights in England?
- 22. American rule.
  - 23. The writ will not run against a private person or one not acting officially.
  - 24. Subject continued.
  - 25. *Mandamus* to parties assuming public duties.
  - 26. When is property devoted to public uses.
  - 27. *Mandamus* lies to those holding public franchises.
  - 27a. *Mandamus* runs to railroad corporations.
  - 28. The writ runs against any corporation.

#### § 21. Is the writ confined to public rights in England?—

1. It has often been decided that the writ of *mandamus* is never issued, except in the cases of public persons or officers, and to compel the performance of public duties.<sup>1</sup> Other courts have expressed the same idea by different phraseology. The writ lies, only for the enforcement of public duties enjoined by law,<sup>2</sup> only where there is a plain dereliction of duty by public officers,<sup>3</sup> only when the party required to act occupies some official or *quasi*-official position,<sup>4</sup> only to enforce official duty imposed by statute,<sup>5</sup> regularly only in cases relating to the public and the government,<sup>6</sup> only where a public trust or official duty is involved,<sup>7</sup> or only to compel the performance of duties imposed by law.<sup>8</sup> It

<sup>1</sup> 3 Stephen's *Nisi Prius*, 2291, 2292; *R. v. London Assur. Co.*, 5 B. & Ald. 901; *American R. F. Co. v. Haven*, 101 Mass. 398; *R. v. Bank of England*, 2 B. & Ald. 620; *R. v. Clear*, 4 B. & C. 901; *R. v. Stafford*, 3 T. R. 646.

<sup>2</sup> *Chumasero v. Potts*, 2 Mont. 242.

<sup>3</sup> *State v. Comm'rs of Shelby Co.*, 36 Ohio St. 326.

<sup>4</sup> *State v. Tolle*, 71 Mo. 645.

<sup>5</sup> *Bank of State v. Harrison*, 66 Ga. 696.

<sup>6</sup> Bacon's Ab., title "Mand."

<sup>7</sup> *Parrott v. City of Bridgeport*, 44 Conn. 180.

<sup>8</sup> *Bailey v. Oviatt*, 46 Vt. 627.



is issued to an inferior tribunal, corporation, board or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station.<sup>1</sup> Notwithstanding these decisions, it is not clear that the writ is confined to public officers or to public affairs. Lord Mansfield is credited with being the judge who developed this writ into one of great usefulness.<sup>2</sup> Prior to his chief justiceship the writ had been used principally, if not entirely, to enforce restitution to public offices, and it is always designated in the older abridgments and reports as "the writ of restitution."<sup>3</sup> He acted on the principle, that where there is a wrong there should be a remedy, and decided that where there is a right to execute an office, perform a service or exercise a franchise, and a person is kept out of possession or dispossessed of such right, the writ of *mandamus* should issue to assist such person, as a matter of justice, and as a matter of public policy to preserve peace, order and good government.<sup>4</sup> A chaplain was kept out of his chapel by one of his parishioners. There were lands attached to the chapel, which belonged to the chaplain by right of his function. The court held that the chaplain was entitled to the writ to restore him to his chaplaincy. This was a private right, and the principal reasons operating on the court seemed to be, that otherwise he was remediless, it being very doubtful whether, under the circumstances of the case, he could bring an action of trespass or of ejectment.<sup>5</sup> In a subsequent case Lord Mansfield restored a dissenting clergyman to his pulpit who had certain emoluments attached to his position or function. The court inclined to the opinion that, since the act of toleration, dissenters and their religious worship should have the assistance of the law, probably because such protection was

<sup>1</sup> *State v. Gracey*, 11 Nev. 223; *People v. Insp. State Prison*, 4 Mich. 187; *Fremont v. Crippen*, 10 Cal. 211; *Smalley v. Yates*, 36 Kan. 519; *In re Woffenden*, 1 Ariz. 237; *Boggs v. Chicago, etc. R. R.*, 54 Iowa, 435.

<sup>2</sup> *People v. Steele*, 2 Barb. 397.

<sup>3</sup> *Tapping on Mandamus*, 3.

<sup>4</sup> *Rex v. Barker*, 3 Burr. 1265.

<sup>5</sup> *Rex v. Blooper*, 2 Burr. 1043.

extended to the state-church. In this opinion it was not considered necessary that the function should be a matter of public concern or attended with profit; but if such questions were involved in the case, the inducement would be greater for the court to act.<sup>1</sup> In another case a few years later a dissenting clergyman was restored to his pulpit. Whether there were any emoluments in this case does not appear, the note thereof being very brief.<sup>2</sup> In fact, as is well known, the phraseology of the decisions rendered at this period and at an earlier date cannot be relied on, since they were often transcribed by the reporters from memory, or from the notes on the papers, and an examination shows that the various reporters often differ in their reports of the same case as to the statements of the judges. The later decisions seem inclined to limit the writ to public affairs. The writ has often been issued to ecclesiastical officers, such as bishops, but they were by law recognized as state officers, and were called on to perform duties imposed on them by law. On the other hand, the writ has been refused for an office not found in the books and not judicially known.<sup>3</sup>

§ 22. **American rule.**—2. In the American courts there are but few cases to be found where the writ has been applied for, for a function dissociated from a public right, a public office or a corporation. The courts often quote with approval Lord Mansfield's ruling on the subject in *Rex v. Barker*, but, since the states have generally accepted the common law as it existed at the time of the first settlements in this country, such rulings, made one hundred and fifty years later, are of course not binding. The common law relative to *mandamus*, as adopted in this country, was very vague and ill-defined, and in the absence of statutory definitions the courts have been compelled to establish the principles governing the issuance of this writ, and to a great extent they have followed the rulings of Lord Mansfield. In Maryland, in 1799, a minister applied for the writ against

<sup>1</sup> *Rex v. Barker*, *supra*.

<sup>3</sup> *Anon.*, 2 Chit. 253.

<sup>2</sup> *Rex v. Jotham*, 3 T. R. 575.

the elders of his congregation. The real estate of the church was held in trust. By contract with the elders he agreed to preach to the congregation, and the elders contracted to furnish him with a house and a certain stipend annually. The court held that he was dispossessed of a function, carrying with it temporal rights, and that religion was a matter of public concern, and the writ was issued.<sup>1</sup> In the same state, in 1805, a priest sought the writ against members of a certain congregation, to which he had been assigned by the bishop, who kept him out of the place and its functions. It does not appear whether there were any emoluments attached to the position, nor whether the church was a corporation. The peremptory writ was issued because the return was adjudged insufficient in its statements.<sup>2</sup> In Delaware, in 1855, a preacher applied for the writ against the parties who held the church property in trust, alleging that they would not allow him to occupy the pulpit of the church and preach to the congregation, which he was entitled to do under the laws of that religious denomination. The writ was refused, because it did not appear that there were any emoluments or compensation of any kind attached to the position or function of a preacher in charge of the church in question.<sup>3</sup> In Massachusetts, in 1829, a man applied for a *mandamus* to compel the parish clerk to give him a certificate of his having joined that parish. He wished to file the certificate with the clerk of the religious society to which he had previously belonged, as evidence of his having left that society. The court refused the writ, remarking that an action was then pending in which the same questions might be tried, and a determination on that summary process might affect the rights of persons who had no opportunity to be heard.<sup>4</sup> In the same volume is a case decided at the next term, which is no doubt the case referred

<sup>1</sup>Runkel v. Winemiller, 4 Harris & McH. 429.

<sup>3</sup>Union Church v. Sanders, 1 Houst. 100.

<sup>2</sup>Brosius v. Reuter, 1 Harr. & Johns. 551.

<sup>4</sup>Oakes v. Hill, 8 Pick. 47.

to. From that decision it appears that parishes were then connected with the state, taxes were collected to pay the minister, and parochial business could be conducted by town officers and in the usual course of municipal proceedings.<sup>1</sup> Of course then the parish clerk was a public officer. In California, when the board of education has elected a person to be a teacher in the public schools, he can only be removed for certain causes specified in the law. The board wrongfully removed a teacher to a school of a different grade from the one in which he was teaching. He was allowed a *mandamus* to restore him to his original position. This was on account of the provisions of the California law, which allows a *mandamus* to issue to compel the admission of a party to the use and enjoyments of a right to which he is entitled and from which he is unlawfully precluded.<sup>2</sup> The statute of Nevada corresponds with that of California. There a *mandamus* may issue to compel the admission of a party to the use and enjoyment of a right from which he is unlawfully precluded by an inferior tribunal, corporation, board, or person. A *mandamus* was brought to compel the respondent to deliver to the relator all the books and papers belonging to the office of the superintendent of a foreign mining company, and to admit him to the enjoyment of all the rights of that position. The writ was issued, though the court stated that the officers of a foreign corporation were not recognized, and admitted that it had no jurisdiction over the corporation. The decision was based on the propositions that its agent had a right to represent a foreign corporation, and that under the statute a *mandamus* would lie to restore a party to the enjoyment of a right.<sup>3</sup> A careful examination of the American cases has failed to show to the writer any other cases, where the writ has been issued to others than public officers and corporations, which are considered to fall within the rule, except under the cir-

<sup>1</sup> Ashby v. Wellington, 8 Pick. 524.

<sup>2</sup> State v. McCullough, 3 Nev. 202.

<sup>3</sup> Kennedy v. Bd. Education, 82 Cal. 483.

cumstances mentioned in the next five sections. It is true that many decisions quote with approval Lord Mansfield's ruling, that those unlawfully dispossessed of a function should be restored by *mandamus*, and many cases are referred to as sustaining that ruling; yet an examination will show that the cases themselves have all related to corporations. From the numerous decisions requiring the writ to be confined to public officers and public affairs, it is not probable that the writ would now be issued, except in Maryland, Delaware, Nevada and California, merely to restore a person to a function or right, though pecuniary emoluments were attached thereto. Lord Mansfield said that the public interest would not be scrupulously weighed, and a number of cases are mentioned in the text-books as being illustrations of that statement. These cases, however, seem to refer to corporate rights, and even in such cases it was necessary to show some public interest,\* because at one time the English courts refused to issue the writ in the case of trading corporations, unless there was some public interest involved in the case.<sup>1</sup> This position, however, they have long since abandoned.<sup>2</sup> In the case of private charities, the writ has on some occasions been denied, and on other occasions granted.<sup>3</sup>

§ 23. The writ will not run against a private person or one not acting officially.— 3. The rule is, that this writ will not run against a private individual,<sup>4</sup> nor will it lie against an officer for acts done in an unofficial character. A register of deeds received a deed as an escrow, which one of the parties forbade him to deliver or record. A *mandamus* requested by the other party to make him record the deed was refused.<sup>5</sup> Where by consent a case was tried be-

<sup>1</sup> R. v. Bank of England, 2 B. & Ald. 620.

<sup>2</sup> Dacosta v. Russia Co., 2 Str. 783;  
Rex v. Turkey Co., 2 Burr. 999;  
King v. St. Katherine D. Co., 4 B.  
& Ad. 360.

<sup>3</sup> Ex parte Trustees Rugby Charity, 9 D. & R. 214; R. v. Abrahams,  
4 Q. B. 157.

<sup>4</sup> Hussey v. Hamilton, 5 Kans. 462.

<sup>5</sup> People v. Curtis, 41 Mich. 723.

fore a lawyer, a private individual, sitting as judge, a *mandamus* to make him sign a bill of exceptions was refused.<sup>1</sup> A county treasurer in collecting delinquent taxes was allowed a per centum as his fee, which was not charged to him. A former treasurer was refused a *mandamus* to compel the county auditor to draw a warrant on his successor in office for fees collected by the latter which belonged to him.<sup>2</sup> The writ will not go to a bailee holding funds as a private individual to execute the terms of the bailment.<sup>3</sup> The speaker of an illegal and unconstitutional body, claiming to be the house of representatives, is a mere private citizen, against whom a *mandamus* cannot issue.<sup>4</sup> When a bill of exceptions is signed by a judge, his power over it is gone, and any alterations made in it afterwards by him are made by a private individual, and a *mandamus* will not issue to him to restore it to its former condition.<sup>5</sup> An officer cannot be compelled to pay a sum of money unless the money is in his official custody, legally subject to the payment of the demand made, when steps are initiated to enforce the demand by a *mandamus*.<sup>6</sup> A party elected to an office is entitled to the papers, books, records and insignia of his office. He may obtain them by *mandamus* from his predecessor, who refuses to surrender them,<sup>7</sup> who must thus be considered to be acting as a *de facto* officer, since the decisions hold that in such a case the writ will not lie against a private individual.<sup>8</sup>

§ 24. Subject continued.— This writ issues if an ex-officer, whether of a public or private corporation, company, church or society, or executor or widow thereof, on demand refuses to deliver to his successor the books, etc.,

<sup>1</sup> State v. Larrabee, 3 Wis. 788.

<sup>2</sup> Thomas v. Hamilton Co. (Auditor), 6 Ohio St. 113.

<sup>3</sup> State v. Bridgman, 8 Kans. 458.

<sup>4</sup> State v. Hayne, 8 Rich. (N. S.) 367.

<sup>5</sup> State v. Powers, 14 Ga. 388.

<sup>6</sup> People v. Reis, 76 Cal. 269.

<sup>7</sup> Prop'rs St. Luke's Church v.

Slack, 7 Cush. 226; Frisbie v. Fogg, 78 Ind. 269; People v. Head, 25 Ill. 325; Kimball v. Lamprey, 19 N. H. 215; Warner v. Myers, 4 Oreg. 72.

<sup>8</sup> Q. v. Hopkins, 1 Ad. & E. (N. S.) 161. *Contra*, St. Luke's Church v. Slack, 7 Cush. 226.

pertaining to his office, but not against a private person who detains them. The writ does not lie to one not holding an official or *quasi*-official station.<sup>1</sup> The writ also lies against one holding the insignia of an office, wrongfully claiming to be the incumbent thereof.<sup>2</sup> An officer surrendered the books of his office (county judgeship) to his successor, but subsequently surreptitiously carried them off. A *mandamus* against him was refused, because it was not alleged that he took the books under any pretense of a color of right to them or to their possession, nor that he was exercising, or pretending to exercise, the duties of the office.<sup>3</sup> It would seem that the necessities of the public service and the uncertainty of procuring the public records by other suits should lead the courts to allow the issuance of the writ in all such cases. The writ has been issued to an officer to deliver up state property which he held without right or authority of law.<sup>4</sup> A board of freeholders were allowed to recover by this writ a public jail from one in whose charge they had placed it under a contract with him.<sup>5</sup> In the earlier reports it appears that the writ was allowed to obtain the books of a borough from an executor who claimed that his decedent had expended money for the borough and held the books as security therefor.<sup>6</sup> Where, however, a private party assumes certain functions whence by law certain duties arise, he will be compelled by *mandamus* to fulfill those duties. A witness to a submission to arbitration was obliged to make affidavit thereof, in order to make it a rule of court according to statute.<sup>7</sup> Where the parties contesting an election chose two persons to take the testimony together, who, after accepting the position, decided that the notice of contest was insufficient and declined to proceed, the court compelled them by this writ to proceed.<sup>8</sup> Where two persons accepted the posi-

<sup>1</sup> State v. Trent, 58 Mo. 571.

<sup>6</sup> King v. Ingram, 1 W. Bl. 50.

<sup>2</sup> Walter v. Belding, 24 Vt. 658.

<sup>7</sup> Clark v. Elwick, 1 Stra. 1;

<sup>3</sup> Hussey v. Hamilton, 5 Kans. 462. Barnes, 58.

<sup>4</sup> State v. Bacon, 6 Neb. 286.

<sup>8</sup> State v. Peniston, 11 Neb. 100.

<sup>5</sup> State v. Layton, 28 N. J. L. 244.

tions of arbitrators under a canal act, but could not agree upon the selection of an umpire, who was provided for by said act in case of their disagreement, a *mandamus* was issued to compel them to select an umpire. The court said they must agree.<sup>1</sup> The legislature incorporated a bank and by the same act appointed a committee to receive subscriptions thereto. It was held that the duties assumed by the committee were of a public character, and the public had an interest in their faithful discharge. If it should appear that, after accepting the appointment and assuming to act, any of the members of the committee should refuse to act, and thereby the act of incorporation might fail, a *mandamus* would lie to make them perform those duties,<sup>2</sup> or it would lie if they should wrongfully refuse to allow a party to subscribe.<sup>3</sup>

§ 25. *Mandamus to parties assuming public duties.*—The laws of the state have recently undertaken to supervise and control certain private occupations, which from their nature or surroundings have become to some extent monopolies, or have become important agencies to large numbers of people in the community in the transaction of their business. The facilities for the rapid transaction of business have of late years greatly increased, while the agencies established for the instantaneous communication of the transactions of all the world have made it essential for all traders to have equal facilities for receiving the news and for shipping or receiving goods. If common carriers, either of news or of goods, could refuse to serve all parties alike, they could ruin the business of any trader, or could establish monopolies. A suit for damages would not re-establish a ruined trade, the customers whereof had been turned to rival operators. So American courts have taken such occupations under their control, and, regarding them as public agencies, have enforced the common law or statutory

<sup>1</sup> King v. Goodrich, 3 Smith, 388.

<sup>3</sup> Napier v. Poe, 12 Ga. 170.

<sup>2</sup> White Run Bank, In re, 23 Vt.  
478.



law against them, and have not hesitated to grant the writ of *mandamus* against any party who, having assumed public duties, endeavored to be partial in the performance of such duties and attempted to give one party an advantage over another.<sup>1</sup> The courts have decided, that property becomes clothed with a public interest when used in a manner to make it of public consequence and to affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but as long as he maintains the use he must submit to the control.<sup>2</sup> This is a departure from the old principle, and of course was very much assailed,<sup>3</sup> but is now too firmly established to be overthrown. Most of the cases which have arisen under this construction of law have been cases of injunction or prosecutions for violations of law, but there have been a number of cases wherein the writ of *mandamus* has been applied for and granted. The assistance of the courts has been frequently extended in the case of telephones, though they are a new invention, for the courts apply the same rule to all agencies which now exist or which may hereafter arise for carrying on commerce, which agencies become public by the nature of their functions.<sup>4</sup> The relations which the telephone has assumed toward the public make it a common carrier of news, a common carrier in the sense in which the telegraph is a common carrier, and impose on it certain well-defined obligations of a public character. All its instruments and property, used in its business, are legally de-

<sup>1</sup> Nash v. Page, 80 Ky. 539; People v. King, 110 N. Y. 418; People v. Budd, 117 N. Y. 1; Chicago, etc. R. R. v. Iowa, 94 U. S. 155; Peik v. Chicago, etc. R. R., 94 U. S. 164. Illinois, *supra*; People v. Budd, 117 N. Y. 1, and People v. Walsh, 117 N. Y. 621.

<sup>4</sup> Pensacola Tel. Co. v. Western U. T. Co., 96 U. S. 1; Telegraph Co. v. Texas, 105 U. S. 460.

<sup>2</sup> Mann v. Illinois, 94 U. S. 113.

<sup>3</sup> Dissenting opinions in Mann v.

voted to a public use. As such common carrier it can show no preference, and must furnish the same conveniences to all persons who offer to pay its charges. In case of failure so to do, a *mandamus* will issue to compel it to do its duty,<sup>1</sup> even though contrary to the provisions of a contract made with the owners of the telephone patent. A common carrier cannot make a contract relieving himself from the duty imposed by law of serving all alike.<sup>2</sup> These decisions were in no sense based on the fact that the respondents were corporations, but on the nature of the duties assumed, and in a similar case the writ would run to an individual.<sup>3</sup> A board of trade had so conducted its business for a series of years as to create a standard market for agricultural products, and, acting in concert and in combination with the telegraph companies, had built up a great system for the instantaneous and continuous indication of the market and its fluctuations, until the public and all dealers in such products had conformed their business to the system and could no longer carry on the business if they were denied the use of such reports. The court held that the board of trade was not compelled to continue the use of the system, but if it did so, it must extend to all applying therefor the benefits thereof upon the same terms.<sup>4</sup> On account of such devotion of their property to public uses, a *mandamus* was issued to compel the owners of steamboats and other water-craft to return to certain state officers the number of passengers and tons of freight carried by them in such craft through certain locks on the water-lines of transportation.<sup>5</sup>

<sup>1</sup> *Hockett v. State*, 105 Ind. 250; *Chesapeake, etc. Co. v. Balt. etc. Co.*, 66 Md. 399; *State v. Nebraska T. Co.*, 17 Neb. 126; *Bell T. Co. v. Com.*, Sup. Ct. Pa., April 19, 1886.

<sup>2</sup> *State v. Bell Telephone Co.*, 36 Ohio St. 296; *State v. Bell T. Co.*, 23 Fed. R. 539; *State v. Delaware, etc. Co.*, 47 Fed. R. 633.

<sup>3</sup> *Chesapeake, etc. Co. v. Balt. etc. Co.*, 66 Md. 399; *Central U. T. Co. v. State*, 118 Ind. 194; *Central U. T. Co. v. State*, 123 Ind. 113.

<sup>4</sup> *Stock Exchange v. Board of Trade*, 127 Ill. 153.

<sup>5</sup> *Canal Com'rs (Board) v. Willamette, etc. Co.*, 6 Oreg. 219.

§ 26. When is property devoted to public uses.—The theory adopted in *Munn v. Illinois*, *supra*, is that when persons assume in their business certain relations toward the public, such business may be regulated by law. Who is to decide when such relations have been assumed? The court mentioned a number of instances of the legal regulation of various kinds of business, as: ferries, wharves, mills, bridges, roads, tavern-keepers, common carriers, hackmen and bakers. The inference from the decision is, that the regulation by the legislature establishes the fact that such business has become of a public nature. Since this writ is now established to be a proper remedy to enforce obedience to law in the case of such duties, we may expect to see it more extensively used therefor in the future. We see no objection to such a liberal use of the writ. A speedy remedy is never objectionable, provided no rights are thereby sacrificed. In England, at present, the writ may be prayed for at the institution of any civil suit, except ejectment and replevin, and if a proper case is established it is granted.<sup>1</sup> However, the legislature has the control of the matter in its own hands. It can determine what occupations are of a public nature and in what cases this writ may issue.

§ 27. *Mandamus* lies to parties holding public franchises.—When there is a grant and acceptance of a public franchise which involves the performance of a certain service, the person or corporation accepting such franchise can by *mandamus* be compelled to perform such service.<sup>2</sup> In such cases there can be no refusal to perform the duties thus devolved upon the grantee without a surrender of the franchise.<sup>3</sup> Among such franchises are included: the right to condemn private property under the power of eminent domain;<sup>4</sup> the right to appropriate water for sale or distribu-

<sup>1</sup> Act of 17 and 18 Vict., ch. 125, § 68.

<sup>2</sup> *Haugen v. Albina & Co.* (Oreg., Dec. 14, 1891), 28 Pac. Rep. 244.

<sup>3</sup> *Olmsted v. Proprietors of Morris Aqueduct*, 47 N. J. L. 311.

<sup>4</sup> *Price v. Riverside, etc. Co.*, 56 Cal. 431.

tion, which the law declares to be a public use, and to collect rates or compensation for the use thereof;<sup>1</sup> the right to dig up the streets and other public ways of a city to place therein pipes and mains for the distribution of illuminating gas for public and private use,<sup>2</sup> and the grant of a monopoly,<sup>3</sup> as the exclusive right to manufacture and sell gas in a city.<sup>4</sup> Such power — in its nature a public power — and the public duty are correlative.<sup>5</sup> It is because of such obligation to render service to the public that the legislature has power to make the grant.<sup>6</sup> Such writ, however, can only issue to enforce a duty.<sup>7</sup> Where the privileges granted are permissive, and not obligatory, the grantee cannot be compelled to exercise them; but if it has exercised them, it will be compelled to perform the duties accruing therefrom.<sup>8</sup> It is not necessary that there should be any express statutory words imposing this duty, but it exists whenever the public use appears.<sup>9</sup>

§ 27a. **Mandamus runs to railroad corporations.**— This writ, of course, runs against railroad corporations, because they are corporations and because they have a *quasi*-public character, having been endowed with the right of eminent domain in condemning land for their uses. The English courts have refused to issue this writ against them to compel them to extend equal facilities to all who pay their charges, asserting that they were allowed, but not required, to carry freight and charge therefor, and also considering that there was adequate compensation by an action for dam-

<sup>1</sup> McCrary v. Beaudry, 67 Cal. 120.

<sup>2</sup> New Orleans G. Co. v. Louisiana L. Co., 115 U. S. 650.

<sup>3</sup> Williams v. Mutual Gas Co., 52 Mich. 499.

<sup>4</sup> Shepard v. Milwaukee G. L. Co., 6 Wis. 539; Gas Light Co. v. Colli-day, 25 Md. 1.

<sup>5</sup> Price v. Riverside, etc. Co., 56 Cal. 431; Lumbard v. Stearns, 4 Cush. 60.

<sup>6</sup> Gordon v. Winchester, 12 Bush, 110; Louisville G. Co. v. Citizens' G. Co., 115 U. S. 683; Lowell v. Boston, 111 Mass. 454.

<sup>7</sup> People v. New York, etc. R. R., 104 N. Y. 58.

<sup>8</sup> Farmers', etc. Co. v. Henning (U. S. C. C. Kans. 1878), 17 Am. Law Reg. (N. S.) 266.

<sup>9</sup> Price v. Riverside, etc. Co., 56 Cal. 431.

ages.<sup>1</sup> In America such action is not considered an adequate remedy. *Mandamus* lies to make a railroad treat all shippers alike;<sup>2</sup> and where it is in the habit of delivering grain at some elevators, to make it deliver it to all elevators;<sup>3</sup> and to make it comply with the provisions of its charter, as to finish its track to the terminus specified in its charter and run cars thereon,<sup>4</sup> though it has contracted with another common carrier not to do so.<sup>5</sup> One court held that a railroad could not, at the relation of a private party, be compelled by *mandamus* to transport his goods, an action for damages being a sufficient remedy;<sup>6</sup> but that the state itself could obtain such a writ to compel it to do its duty as a common carrier of freight and passengers.<sup>7</sup>

§ 28. The writ runs against any corporation.— This writ issues in a proper case against any corporation. This may be considered as an exception to the rule that it only issues against public officers. However, such jurisdiction is well established, and the reason assigned therefor is that the courts have such supervisory jurisdiction over corporations to see that they act agreeably to the end of their institution, and that the king's charters are properly observed.<sup>8</sup>

<sup>1</sup> *Ex parte Robins*, 3 Jur. 103.

<sup>5</sup> *State v. Hartford, etc. R. R.*, 29

<sup>2</sup> *State v. Delaware, etc. R. R.*, 48 Conn. 538.

N. J. L. 55.

<sup>6</sup> *People v. New York, etc. R. R.*,

<sup>3</sup> *Chicago, etc. R. R. v. People*, 56 22 Hun, 533.

Ill. 365.

<sup>7</sup> *People v. New York, etc. R. R.*,

<sup>4</sup> *People v. Rome, etc. R. R.*, 103 28 Hun, 543.

N. Y. 95; *People v. Albany, etc. R. R.*, 24 N. Y. 261.

<sup>8</sup> *R. v. Askew*, 4 Burr. 2186; *post*, § 157.

## CHAPTER 5.

### GENERAL PRINCIPLES GOVERNING THE ISSUE OF THE WRIT OF MANDAMUS.

- § 29. General nature of acts to which the writ applies.
- 30. Ministerial acts.
- 31. Distinction between ministerial and judicial acts illustrated.
- 32. *Mandamus* to take action in judicial or discretionary matters.
- 33. *Mandamus* not lie when performance is discretionary.
- 34. Permissive statutes may be mandatory.
- 35. Though the act calls for discretion, no excuse for non-action.
- 36. *Mandamus* to take jurisdiction when wrongfully declined.
- 37. *Mandamus* not lie when officer has acted in a discretionary matter.
- 38. Exceptions as to interfering with acts involving discretion.
- 39. Illustrations of such interference.
- 40. *Mandamus* when fraud or prejudice has influenced action.
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- 42. The writ of *mandamus* will not lie to undo what has been done.
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- 45. English rule as to preliminary questions.
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- 51. Writ denied when there are other remedies.
- 52. Other remedy must be speedy.
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- 54. Other remedy must be specific.
- 55. Other remedy must be a legal remedy.
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- 57. Obligation on respondent to do the act must be absolute.
- 58. *Mandamus* not lie, if act only to be done on approval of another.
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- 60. Corollaries from preceding sections.
- 61. *Mandamus* is entirely a civil remedy.

### § 29. General nature of acts to which the writ applies.

This writ lies to compel the performance of any act purely ministerial, and to compel an officer, whose duty it is to act in a matter which requires judgment and discretion, to hear and pass on the matter. In the former case the court will specifically order the act to be done,<sup>1</sup> but in the latter case the decision is left to the officer or tribunal charged with the consideration of the subject.<sup>2</sup> It is the character of the duty, but not that of the body or officers, which determines how far it may be enforced by *mandamus*.<sup>3</sup>

§ 30. Ministerial acts.—A ministerial act is one which a public officer or agent is required to perform upon a given state of facts in a prescribed manner in obedience to the mandate of legal authority, and without regard to his own judgment or opinion concerning the propriety or impropriety of the act to be performed.<sup>4</sup> But when the act to be done involves the exercise of discretion or judgment in determining whether the duty exists, it is not to be deemed purely ministerial.<sup>5</sup> As to all acts calling for the exercise of judgment or discretion on the part of the officer or body at whose hands performance is sought, a *mandamus* will not lie.<sup>6</sup> If, however, the facts are admitted which alone

<sup>1</sup> *People v. McCormick*, 106 Ill. 184; *Attorney-General v. Boston*, 123 Mass. 460; *Carpenter v. Bristol* (Co. Com'rs), 21 Pick. 258; *State v. Williams*, 69 Ala. 311; *Carrick v. Lamar*, 116 U. S. 423; *Mooney v. Edwards*, 51 N. J. L. 479.

<sup>2</sup> *People v. Troy* (Common Council), 78 N. Y. 33; *Williams v. County Commissioners*, 35 Me. 345; *Secretary v. McGarahan*, 9 Wall. 298; *Ex parte Many*, 14 How. 24; *State Board of Education v. West Point*, 50 Miss. 638; *People v. Dental Examiners*, 110 Ill. 180; *Com. v. Boone County Court*, 82 Ky. 632; *State v. Board of Liquidators*, 23 La. An. 388; *R. v. North Riding*, 2 B. & C. 286; *Ewing v. Cohen*, 63 Tex. 482;

*Ex parte Hays*, 26 Ark. 510; *R. v. Middlesex* (Justice), 4 Barn. & Ald. 300.

<sup>3</sup> *Marbury v. Madison*, 1 Cranch, 137; *People v. Dental Examiners*, 110 Ill. 180; *Ex parte Harris*, 52 Ala. 87; *People v. Troy* (Council), 78 N. Y. 33.

<sup>4</sup> *Insurance Company v. Wilder*, 40 Kans. 561; *Gray v. State*, 72 Ind. 567; *United States v. Whitney*, 16 Dist. Col. 370.

<sup>5</sup> *Bledsoe v. International R. R.*, 40 Tex. 537; *Arberry v. Beavers*, 6 Tex. 457; *Scripture v. Burns*, 59 Iowa, 70; *Newport (City) v. Berry*, 80 Ky. 354; *Hoole v. Kinkead*, 16 Nev. 217; *Eve v. Simon*, 78 Ga. 120.

<sup>6</sup> *Devin v. Belt*, 70 Md. 352; *State*

allow discretion, a *mandamus* may issue to compel the performance of the act.<sup>1</sup>

**§ 31. Distinction between ministerial and judicial acts illustrated.**—The courts, and not the officers charged with the duties, are the final arbiters as to whether such duties are ministerial or judicial,<sup>2</sup> and in their determinations great differences will be found.<sup>3</sup> All acts or duties, depending upon a decision of a question of law or the ascertainment of matters of fact by the officer or tribunal charged with the duty, are considered to be judicial.<sup>4</sup> The federal courts place very strict limitations upon the use of the writ of *mandamus*. They hold that it was never intended that the writ should be used to interfere with the executive officers of the government in the exercise of their ordinary official duties, nor will it lie when the evidence in the case exists in parol, involving the necessity of taking proofs, nor when controverted matters must be judicially heard and decided by the officer to whom the writ is required to be addressed.<sup>5</sup> But when by special statute or otherwise a mere ministerial duty is imposed upon them, and they refuse to perform it, *mandamus* lies to compel them to perform such duty.<sup>6</sup> When a subordinate officer is overruled by his superior, having appellate jurisdiction over him, his duty to obey the decision of such superior is a ministerial duty, which he can be compelled by *mandamus* to perform.<sup>7</sup>

v. Martin County (Com'rs), 125 Ind. 247; Sansom v. Mercer, 68 Tex. 488; In re Woffenden, 1 Ariz. 237.

<sup>1</sup> Henry v. Taylor, 57 Iowa, 72; Briggs v. Hopkins, 16 R. I. 83.

<sup>2</sup> State v. Watertown (Council), 9 Wis. 254.

<sup>3</sup> State v. County Court, 33 W. Va. 589.

<sup>4</sup> Mooney v. Edwards, 51 N. J. L. 479; People v. Troy (Com. Council), 78 N. Y. 33; Hoole v. Kinkaid, 16 Nev. 217; Sansom v. Mercer, 68 Tex. 488; State v. Wright, 4 Nev. 119; People v. Allegan Circuit

(Judge), 29 Mich. 487; State v. Verner, 30 S. C. 277. *Contra* as to questions of law, Thomas v. Armstrong, 7 Cal. 286.

<sup>5</sup> Secretary v. McGarrahan, 9 Wall. 298; United States v. Commissioner, 5 Wall. 563; United States v. Raum, 135 U. S. 200; Carrick v. Lamar, 116 U. S. 423; Reeside v. Walker, 11 How. 272; United States v. Windom, 137 U. S. 636.

<sup>6</sup> United States v. Raum, 135 U. S. 200; Carrick v. Lamar, 116 U. S. 423.

<sup>7</sup> United States v. Raum, 135 U. S. 200.



It is no objection to the issuance of this writ that it requires a multiplicity of acts, requiring an exercise of judgment and discretion as to details. It has been issued to compel a railroad to grade its tracks so as to make the crossings practically convenient and useful, to construct its road over a stream so as not to interfere with navigation, to replace a part of its track which it has wrongfully taken up, to run daily trains, etc.<sup>1</sup> Where, however, the duty required consists of a number of actions, and at the same time it is vague in many particulars, the courts will decline to enforce it by this writ. An act of the legislature required the supervisors of a county to let the construction of the public buildings to the lowest bidder, to erect those buildings in a certain place, to have them completed in a certain time, and to levy a tax to defray the expenses thereby incurred. The court refused to enforce this duty by the writ of *mandamus* because the law was very vague in many of its provisions.<sup>2</sup> Its object, though, is to compel the doing of particular specified acts, and not to constrain a person to regulate his whole course of conduct according to some general principle.<sup>3</sup> In order, however, that a decision may be considered to be judicial, it must be upon law or facts legitimately involved in the question before the tribunal; otherwise the decision is reviewable by *mandamus*.<sup>4</sup> As long as there is any reasonable doubt as to whether or not a matter depends upon the result of an inquiry or investigation into the facts, or which involves the hearing and consideration of evidence, which is to control the action of the officer or tribunal, courts will not undertake to review the conclusion or judgment by a *mandamus* proceeding, after the body or officer has acted.<sup>5</sup> The writ has been refused, because the acts involved discretion and judgment, to compel the clerk of the circuit court to approve a bond

<sup>1</sup> Ohio & M. R. R. v. People, 120 Ill. 200.

<sup>2</sup> State v. Washington County (Sup'rs), 2 Chand. 247.

<sup>3</sup> State v. Einstein, 46 N. J. L. 479.

<sup>4</sup> People v. Judge Allegan Circuit, 29 Mich. 487.

<sup>5</sup> State v. Greene County (Board Com'rs), 119 Ind. 444.

for costs in a contest over the election of a judge of probate,<sup>1</sup> to compel the board of commissioners to approve the bond of a justice of the peace,<sup>2</sup> to make a probate court pass on the last will of the deceased before passing on a prior one,<sup>3</sup> to make a board of health issue to a physician a license to practice,<sup>4</sup> to approve a bond for a license to sell whisky,<sup>5</sup> to compel a board of education to approve of a school teacher,<sup>6</sup> to make the secretary of the interior cause certain public lands to be surveyed and sold,<sup>7</sup> and to correct an error in a tax duplicate.<sup>8</sup> An auditor was required to place certain assessments on the tax duplicate for collection, such duty being considered merely ministerial.<sup>9</sup> Before issuing this writ to a ministerial officer the court must ascertain what is his specific duty in the premises.<sup>10</sup>

**§ 32. Mandamus to take action in judicial or discretionary matters.**—The writ lies to make a body or officer charged with a duty, involving judgment or discretion, take action in the matter.<sup>11</sup> When a subordinate body is vested with power to determine a question of fact, the duty is judicial, and though it can be compelled by *mandamus* to determine the fact it cannot be directed to decide in a particular way, however clearly it may be made to appear what that decision ought to be.<sup>12</sup> A court will be ordered to proceed to judgment, but it will not be instructed to render a particular judgment.<sup>13</sup> It is said there is not a case where the king's bench has ordered an inferior court to render a particular judgment.<sup>14</sup> When a decision has been reached in a matter involving discretion, a writ of *mandamus* will

<sup>1</sup> McDuffie v. Cook, 65 Ala. 430.

<sup>9</sup> State v. Stout, 61 Ind. 143.

<sup>2</sup> County Commissioners (Board) v. Crotty, 9 Colo. 318.

<sup>10</sup> State v. Garesche, 65 Mo. 480; State v. Williams, 95 Mo. 159.

<sup>3</sup> People v. Knickerbocker, 114 Ill. 539.

<sup>11</sup> Com. v. Cochran, 6 Binn. 456.

<sup>4</sup> State v. Gregory, 83 Mo. 123.

<sup>12</sup> People v. Troy (Com. Coun.), 78 N. Y. 33.

<sup>5</sup> Parker v. Portland, 54 Mich. 308.

<sup>13</sup> Police Board v. Grant, 9 Sm. & M. 77.

<sup>6</sup> Wintz v. Board of Education, 28 W. Va. 227.

<sup>14</sup> R. v. Middlesex (Just.), 4 B. & Ald. 300.

<sup>7</sup> Carrick v. Lamar, 116 U. S. 423.

<sup>8</sup> Lynch, Ex parte, 16 S. C. 32.

not lie to review or correct it, no matter how erroneous it may be.<sup>1</sup> The writ lies to make a judge sign a bill of exceptions, but it will not lie to compel him to sign a particular bill.<sup>2</sup> A superintendent of highways, who had discretion in the matter, was not compelled to certify for the benefit of a contractor that certain roads were kept in good repair, though the court found that they were so kept.<sup>3</sup> When the supervisors refuse to allow a claim as a county charge, the writ will go to compel them to pass on it, if it is properly such a charge, but the amount of the allowance will be left to their judgment.<sup>4</sup> When an auditor is vested with discretion in passing on a claim against a county, a *mandamus* will lie to compel him to consider it, if he refuse to do so.<sup>5</sup> A *mandamus* will lie to the county commissioners to act in approval or disapproval of the bond of the clerk of the superior court, but not to control their judgment or discretion in the matter.<sup>6</sup> If the visitor of a corporation improperly refuse to hear a case, he will be compelled to pass on it. If he has acted thereon, his judgment is final.<sup>7</sup> The writ was applied for to compel the justices to hear an information. They returned that they had heard it and had dismissed it, because it was not filed in time under the statute. The writ was refused, because the justices had heard and determined the question.<sup>8</sup> The writ was applied for to compel the mayor and comptroller to determine which four papers had the largest daily circulation in order to award to them under the law the corporation advertising. The court stated that it could compel the comptroller to meet with the mayor, but it could not compel the two to agree in their decision, because a question of fact, requiring

<sup>1</sup> Regina v. Bristol (Just.), 28 Eng. L. & E. 160.

<sup>2</sup> Thornton v. Hoge, 84 Cal. 231.

<sup>3</sup> Seymour v. Ely, 37 Conn. 103.

<sup>4</sup> Hull v. Oneida Co. (Sup'rs), 19 John. 259; Tilden v. Sacramento Co. (Sup'rs), 41 Cal. 68; People v. Macomb Co. (Sup'rs), 3 Mich. 475.

<sup>5</sup> Burnet v. Portage Co. (Aud.), 12 Ohio, 54.

<sup>6</sup> Buckman v. Beaufort (Com'rs), 80 N. C. 121.

<sup>7</sup> 6 Bacon's Ab., tit. "Mand." C. 2; *post*, § 175.

<sup>8</sup> Q. v. Mainwaring, Ellis, B. & E. 474.

the consideration of evidence, was involved.<sup>1</sup> Though the courts will not interfere with the executive officers of the government in their ordinary official duties, yet when they refuse to act at all in a case in which the law requires them to do so, they will be compelled to take action by this writ.<sup>2</sup> This writ lies to compel public officers to act with reasonable promptness in performing any duty involving discretion.<sup>3</sup>

**§ 33. Mandamus not lie when — Performance is discretionary.**— When the duty is not mandatory, but the officer or body is allowed a discretion as to when the ministerial act shall be performed, or whether it shall be performed at all, such performance will not be enforced by the writ of *mandamus*.<sup>4</sup> Where a county board had a discretion as to when and how it should construct bridges, a petition for a *mandamus* to compel the construction of a bridge was rejected.<sup>5</sup> Where a court had a discretion as to whether it would hear charges preferred against a justice of the peace, a *mandamus* to compel such hearing was denied.<sup>6</sup> The writ was refused to compel the attorney-general to file a *quo warranto*, because the law allowed him a discretion in doing so.<sup>7</sup> The board of liquidators were not required by *mandamus* to sell the state bonds in order to fund the floating state debt, because the law allowed them a discretion as to whether or not and when they should proceed to sell them.<sup>8</sup>

**§ 34. Permissive statutes may be mandatory.**— It does not follow, however, because the words of a statute are

<sup>1</sup> *People v. Brennan*, 39 Barb. 651.

<sup>2</sup> *United States v. Raum*, 135 U. S. 200.

<sup>3</sup> *State v. Belmont Co. (Com'rs)*, 31 Ohio St. 451.

<sup>4</sup> *State v. Washington Co. (Board Sup'rs)*, 2 Chand. 247; *State v. Canal, etc. R. R.*, 23 La. An. 333; *Board of Supervisors v. People*, 110 Ill. 511; *R. v. Fowey (Mayor)*, 2 B. & C. 591; *Ottawa v. People*, 48 Ill. 233; *State v. Warmouth*, 23 La. An. 76; *State*

*v. Burnside*, 33 S. C. 276; *People v. Farquer, Breese*, 68; *Davisson v. Board of Supervisors*, 70 Cal. 612; *Rollersville, etc. Co. v. Sandusky Co.*, 1 Ohio St. 149.

<sup>5</sup> *St. Clair County v. People*, 85 Ill. 396.

<sup>6</sup> *Ex parte Johnson*, 3 Cow. 371.

<sup>7</sup> *People v. Attorney-General*, 41 Mich. 728.

<sup>8</sup> *State v. Warmoth*, 23 La. An. 76.

permissive, that the body or officer has a discretion in performing the act. When the words of a statute are permissive, but public rights or interests are concerned, or the public or third parties have a claim *de jure* that the power shall be exercised, such words will be construed to be obligatory.<sup>1</sup>

§ 35. **Though the act calls for discretion, no excuse for non-action.**—The fact that the act to be done calls for the exercise of discretion will not be allowed to be an excuse for non-action. The supervisors of a county were by an act of the legislature required to issue bonds for the purpose of improving the roads of the county, which bonds, after advertisement thereof, were to be sold to the highest bidder, but the supervisors had authority to reject all bids. The court declared the law to be mandatory, and that the power to reject bids must be used to effectuate, and not to defeat, legislation. The supervisors were ordered to sell the bonds to the highest bidders.<sup>2</sup> Two arbitrators appointed under a canal act could not agree on an umpire who was provided for under the act. The court said they must agree, and issued a *mandamus* to that effect.<sup>3</sup> A peremptory writ was issued to the common councils of a city to levy a tax to pay certain city bonds. Upon a proceeding for contempt of court, it was considered that the members had not discharged their duty by voting for a proper ordinance. Each member was bound to see that a proper ordinance was passed and recorded, so as to be a law. The differences between the councils could be harmonized as to amount, etc. Each member was bound to be

<sup>1</sup>Supervisors v. United States, 4 20 Md. 449; People v. Buffalo Co. Wall. 435; Brokaw v. Commissioners of Highways, 130 Ill. 482; Tallapoosa (Com'rs Court), 17 Ala. 527; People v. Otsego Co. (Sup'rs), 51 N. Y. 401; State v. Camden, 39 N. J. L. 620; People v. Bloomington (Mayor), 63 Ill. 207.  
<sup>2</sup>People v. San Luis Obispo Co. (Sup'rs), 50 Cal. 561.  
<sup>3</sup>King v. Goodrich, 3 Smith, 388.

diligent in attending to the passage of such an ordinance. He could not say that his duty was done because the majority of his council or the other branch of the councils had fixed a different rate of taxation from what he thought necessary.<sup>1</sup>

**§ 36. Mandamus to take jurisdiction when wrongfully declined.**—When the tribunal or officer whose duty it is to take jurisdiction of a matter, believing erroneously that it has no jurisdiction, declines to consider the matter, a *mandamus* will issue to compel such a hearing,<sup>2</sup> viz., when a court refuses to assume jurisdiction and hear a cause,<sup>3</sup> or the county commissioners refuse to take cognizance of a claim against the county.<sup>4</sup>

**§ 37. Mandamus not lie when officer has acted in discretionary matter.**—When an officer, body or tribunal has acted in a matter which calls for the exercise of judgment or discretion, the writ of *mandamus* does not lie to review or reverse such action.<sup>5</sup>

**§ 38. Exceptions as to interfering with acts involving discretion.**—The proposition just stated must, however, be received with some qualification or explanation. The courts have sometimes interfered in such cases, and have by the writ of *mandamus* reviewed the judicial actions of officers or inferior tribunals. In some cases it was held that the admitted facts showed that the action was taken under a

<sup>1</sup> Com. v. Taylor, 36 Pa. St. 263.

<sup>2</sup> Reg. v. Goodrich, 19 L. J. Q. B. 413; S. C. reported as Reg. v. Leicester, 15 Q. B. 671.

<sup>3</sup> People v. Swift, 59 Mich. 529; State v. Laughlin, 75 Mo. 358; *post*, § 203.

<sup>4</sup> State v. Hamilton Co. (B'd Com'rs), 26 Ohio St. 364.

<sup>5</sup> Hoole v. Kinkad, 16 Nev. 217; King v. Cambridgeshire (Just.), 1 D. & R. 325; People v. Albany (Sup'rs), 12 Johns. 414; Younger v. Board Sup'rs, 68 Cal. 241; State v. Lafayette Co. Ct., 41 Mo. 221; Apple-

ford's Case, 1 Mod. 82; King v. Ely (Bishop), 5 Term R. 475; Weeden v. Richmond (Council), 9 R. I. 128; Collarn's Petition, 134 Pa. St. 551; Burnet v. Portage Co. (Aud.), 12 Ohio St. 54; Com. v. Cockran, 6 Binn. 456; Tilden v. Sacramento Co. (Sup'rs), 41 Cal. 68; State v. Health Board (State), 103 Mo. 22; Scripture v. Burns, 59 Iowa, 70; Insur. Co. v. Wilder, 40 Kans. 561; State v. Carey (N. Dak., June 16, 1891), 49 North W. Rep. 164; Hayes, *Ex parte* (Ala., April 9, 1891), 9 South. R. 156.

misapprehension of the law, so that the officer could not be considered to have exercised his discretion in the matter; in other cases the conclusions reached were due to matters of fact not involved in the discretion given, or to mistakes in law not germane thereto; in other cases the courts claimed a great latitude in interfering with inferior courts by reason of their supervisory power over them.

§ 39. **Illustrations of such interference.**— When a decision itself showed that the quarter sessions had not exercised their discretion, the writ issued to compel them to do so.<sup>1</sup> A vestry had a discretion as to the amount of pension they should allow a retiring officer, but they thought they had no discretion as to the amount under a prior decision of the court, and accordingly refused any pension, though they had determined to allow a smaller pension. From the report these facts seem to have been admitted in the argument. It was held, that they could not be considered to have exercised their discretion in a proper manner, and the writ of *mandamus* was issued to them to consider and determine the application.<sup>2</sup> When the quarter sessions dismissed an appeal for want of notice thereof, which no rule required, the writ issued.<sup>3</sup> The English courts have also corrected errors of judgment in the exercise of such discretion, which clearly appeared on the record. A litigant served a notice of appeal one day later than the time fixed by rule. He mistook the rule, believing that either the day of service or the day of hearing could be included in the computation of time, whereas the rule excluded both days. The justices refused to hear the appeal. The court of king's bench considered that under its visitatorial jurisdiction the court could ascertain whether the justices had exercised their discretion properly. The court decided that justice would be better subserved by a hear-

<sup>1</sup> *R. v. Adamson*, 1 Q. B. D. 201.      <sup>3</sup> *R. v. West Riding of Yorkshire*,

<sup>2</sup> *Q. v. St. Pancras*, 24 Q. B. D. 5 B. & Ad. 667.

ing, and ordered the justices to entertain the appeal.<sup>1</sup> In another case it was admitted that the justices had a discretion in deciding what was a reasonable time for giving notice of appeal. They had adopted a new rule on the subject, of which the appellant's attorney had no notice. He gave his notice according to the former practice. The justices refused to hear the appeal. The court considered that the justices had not exercised their discretion properly, and issued its writ to compel them to consider the appeal.<sup>2</sup> Lord Tenterden said: "It is true in some instances, where the sessions have established a rule, which in its operation has been found manifestly inconvenient for the purposes of justice, the court has interfered to control their discretion, but it is going a great length."<sup>3</sup> Under the statute the justices had a right to fix the wages of millers. The justices had decided against the petition of the millers to have their wages fixed. They admitted they did so because they believed the law did not apply to millers. They were ordered to hear the request, and then to determine whether in their discretion they thought proper to fix a rate of wages.<sup>4</sup> A court, having a supervisory superintending control over other courts by *mandamus*, claimed that such control was as broad as the exigency of the case. It held, that if a lower court had plainly erred on a point of practice, either by misapprehending its own rules or a plain rule of law, and in consequence had dismissed an appeal, a writ of *mandamus* would lie to correct and remedy the erroneous and arbitrary exercise of its discretion.<sup>5</sup> Where a board of public improvements refused to issue a license because the applicant therefor would not comply with certain conditions, which they had imposed without authority of law, a *mandamus* was issued to compel the granting of the license.<sup>6</sup>

<sup>1</sup> King v. Lancashire (Just.), 7 B. & C. 691.

<sup>2</sup> King v. Wiltshire (Just.), 10 East, 404.

<sup>3</sup> Becke, Ex parte, 3 B. & Ad. 704.

<sup>4</sup> King v. Kent (Just.), 14 East, 395.

<sup>5</sup> State v. Philips, 97 Mo. 331.

<sup>6</sup> State v. Flad, 23 Mo. Ap. 185.



A party was entitled by law to a renewal of his ferry license, if he had properly conducted the business during the prior year. The county commissioners found no fault with his conduct, but refused to renew his license because his ferry franchise had been sold under a judgment against him, which sale they believed conveyed his title (whereas his franchise was not legally vendible under an execution), and they issued a license to the purchaser. The county commissioners were required by *mandamus* to renew the license.<sup>1</sup> Where an officer was entitled to judge of the sufficiency of a bond, but stated in his return that he refused to issue the license because he thought the law allowed him to decide who were proper parties to receive licenses, the court, finding that the officer was not allowed discretion in that matter, ordered him to issue the license.<sup>2</sup> In passing on a bond offered as security for an attachment the clerk was considered to be acting in a *quasi-judicial* capacity, and if he should refuse to accept such a bond because he considered the sureties to be insufficient, or for no assigned reason, a *mandamus* would not lie to him to accept the bond; but if he based his refusal on a reason insufficient in law, a *mandamus* would lie.<sup>3</sup> This last decision has been assailed on the ground that it is immaterial that the discretion granted has been guided by a mistaken reason.<sup>4</sup> "The prohibition to interfere does not lose its force because a wrong reason has led to a wrong conclusion. The books abound in cases where the courts refuse *mandamus* notwithstanding the mistake or error of the officer whose discretion is sought to be controlled, and it would be an anomaly to hold that refusal is proper when a wrong conclusion is reached without giving the reason for it, but not proper if the reason be given and it is found not a good

<sup>1</sup> Thomas v. Armstrong, 7 Cal. 286.

<sup>2</sup> People v. Perry, 13 Barb. 206.

<sup>3</sup> Mobile, etc. Co. v. Cleveland, 76 Ala. 321.

<sup>4</sup> State v. Barnes, 25 Fla. 298; State v. Joint School District, 65

Wis. 631; Ramagnano v. Crook, 85 Ala. 226.

one.” The courts “only check the exercise of discretion when assumed in regard to matters not properly within it, or when mistake is made in law not germane to the discretion.” The case from which the above citations are taken was also concerning the rejection of a bond, and the court considered it immaterial whether the respondent’s objections to the legality of the bond were correct, since his mistake, if any, could not be corrected by a *mandamus*.<sup>1</sup> In one case the court said that though a county board has a discretion as to when and how it shall repair the roads, yet if it should wholly neglect to repair the roads, it could be compelled to proceed to repair, but not in a specific manner.<sup>2</sup>

**§ 40. Mandamus when fraud or prejudice has influenced discretionary action.**—Again it may happen, that the person or tribunal charged with discretion or with a judicial decision of the matter has been influenced by fraud, passion, adverse interest or prejudice in its action. In such cases justice requires that there should be some redress. Accordingly, when such parties have acted in bad faith or corruptly in reaching their decisions, the courts hold that their conclusions may be reviewed by the writ of *mandamus*.<sup>3</sup> But the question remains, how shall it be determined that there has been an abuse of discretion. The rulings of the courts are not in harmony on this proposition. If the tribunal or officer has a discretion to find one way or the other, to do the act or not to do it, the mere fact that it has decided one way rather than the other cannot warrant the conclusion that it has acted in bad faith or corruptly. The courts have said that where there is a right of approving a fit per-

<sup>1</sup> State v. Barnes, 25 Fla. 298, where many decisions are reviewed; People v. Allegan Circuit Judge, 29 Mich. 487.

<sup>2</sup> St. Clair County v. People, 85 Ill. 396.

<sup>3</sup> Newport (City) v. Berry, 80 Ky. 354; Davis v. Co. Com’rs, 63 Me. 396; Lord Denman in R. v. Darlington, 12 L. J. Q. B. 128; Brad-

ley, Ex parte, 7 Wall. 364; Virginia v. Rives, 100 U. S. 313; State v. Cramer, 96 Mo. 75; People v. Turner, 1 Cal. 143; Brokaw v. Highway Com’rs, 130 Ill. 482; Arberry v. Beavers, 6 Tex. 457; Louisville (City) v. Kean, 18 B. Mon. 9; Poor Com’rs v. Lynah, 2 McCord, 170; Schlaudecker v. Marshall, 72 Pa. St. 200.

son to office, such discretion must be exercised in a fair, candid and unprejudiced manner, but that they will not compel a disclosure of the grounds by which the conclusion was arrived at.<sup>1</sup> In a *mandamus* proceeding to admit and swear in the relator as an alderman, the return was that the respondents had examined into the matter and had determined that the relator was not a fit person to be an alderman, as the law authorized them to do. All the judges held, that the respondents were not required to state the grounds for their conclusion, and Pattison, J., considered that it would be improper for them to do so, but Taunton, J., said that if they did allege their reasons, and such reasons were bad, the court would interfere.<sup>2</sup> Again the return itself has been held to be a conclusive disproof of any fraud or prejudice. When in an application for a *mandamus* to compel a village board to approve the bond of a liquor dealer, it was alleged that the board had arbitrarily refused to receive the bond, and the sworn return stated that they had examined it and upon investigation found the sureties to be insufficient, stating the ascertained resources of each surety, the court held that there was nothing to show that their discretion was not exercised reasonably and in good faith.<sup>3</sup> Such a ruling would enable the respondents in every case to defeat any effort to review their actions in matters involving discretion or judgment by merely inserting proper allegations in their returns; but the weight of authority does not sustain this ruling. Where the respondents give their reasons for their action, which reasons are adjudged to be invalid, of course no difficulty is presented.<sup>4</sup> Where a party had a discretion as to the approval of a bond solely

<sup>1</sup> Lord Ellenbury in *R. v. Canterbury* (Archb.), 15 East, 139; Lord Holt in *Phillips v. Bury*, 2 T. R. 356, his dissenting opinion being sustained on appeal, 1 L. Raym. 5; *Mobile, etc. Co. v. Cleveland*, 76 Ala. 321; *King v. Gloucester* (Bishop), 2 B. & Ad. 158.

<sup>2</sup> *King v. London (Mayor)*, 3 Barn. & Ad. 255.

<sup>3</sup> *Palmer v. Hartford (Village)*, 73 Mich. 96.

<sup>4</sup> *King v. London (Mayor)*, 3 Barn. & Ad. 255.

relative to the responsibility of the sureties thereon, and it appeared by the pleadings in the *mandamus* proceedings that his objections to the bond did not relate to the sureties, a peremptory writ was issued ordering the approval of the bond.<sup>1</sup> When a court had only a limited discretion about issuing licenses to wholesale liquor dealers, it was held that if the return to the alternative writ showed no reason, or one invalid under the law, for refusing the license, the *mandamus* should issue; that if it showed a sufficient ground for such refusal the proceedings must be dismissed.<sup>2</sup> In a similar case the court said that if a remonstrance against the issuance of the license was filed and heard as shown by the return, it would thereby appear there was sufficient reason for the refusal, and the writ would be denied.<sup>3</sup> In some cases the courts have held the abuse of discretion to be admitted, because the cases were submitted on demurrers to the alternative writ, thereby admitting the charge made in the writ, or because the returns did not properly meet the allegations of the alternative writ, and they have proceeded to grant the relief asked.<sup>4</sup> Where malice and an attempt to use discrimination in order to build up an institution in which the respondents were interested, and to destroy opposition thereto, were directly charged, such charges were considered to be admitted by the submission of the cause on demurrer.<sup>5</sup> When a county court refused to hear any testimony relative to a bond offered for its approval, or to pass on the sufficiency of the security offered, the court ordered the county court to accept and approve the bond, the case having been submitted on a demurrer to the alternative writ.<sup>6</sup> In a similar case submitted on demurrer, the county court, after arbitrarily rejecting the

<sup>1</sup> Briggs v. Hopkins, 16 R. I. 83;      <sup>4</sup> Zanove v. Mound City, 103 Ill.  
McLeod v. Scott (Oreg., June 24, 1891), 26 Pac. Rep. 1061.      552.

<sup>2</sup> Prospect B. Co.'s Petition, 127 Pa.      <sup>5</sup> Dental Examiners v. People, 123

St. 523.      Ill. 227.

<sup>3</sup> Collarn's Petition, 134 Pa. St.      <sup>6</sup> State v. La Fayette Co., 41 Mo.

551.

bond offered, at once declared the office vacant; the higher court issued a peremptory *mandamus* to accept and approve the bond offered.<sup>1</sup> When the respondents in their return fail to give their reasons for their official action in refusing to issue a license, to which any citizen is entitled upon placing himself within the provisions of the law, and in their answer assume that they are the sole arbiters of the question, the court can only assume that they have acted arbitrarily and without reason.<sup>2</sup> In such matters the officers cannot reject a petition without assigning any reason and without allowing relief to the appellant by an appeal to the courts. They must assign their reasons for their action that the petitioner may have a chance to remove their objections.<sup>3</sup> There are a number of decisions to the effect, that the relator must allege and prove, unless it is admitted, that the officer has exercised his judgment in a fraudulent or arbitrary manner, before the court will interfere in his behalf, and that it will then grant him the desired relief.<sup>4</sup> Where it was objected, that a *mandamus* could not issue to compel a city to issue its bonds to a railroad in accordance with its subscription, because the city council was first to certify that the work was done properly and to its satisfaction, the court said that, if an official duty is to be performed on the happening of an event, the officer cannot arbitrarily or capriciously refuse to perform it after the event has happened. If the fact exists and is established by sufficient proofs, it is his legal duty to be satisfied and to act accordingly. The fact of the due performance of the work being shown in the *mandamus* proceeding the peremptory writ was awarded.<sup>5</sup> It has been

<sup>1</sup> State v. Texas Co., 44 Mo. 230.

<sup>2</sup> Amperse v. Kalamazoo (City), 59 Mich. 78.

<sup>3</sup> Amperse v. Kalamazoo (City), 59 Mich. 78; Mixer v. Manistee County (Sup'rs), 26 Mich. 423. In another case it was stated that common courtesy required them to give their reasons, but that no law

required them to do so. Parker v. Portland, 54 Mich. 308.

<sup>4</sup> Jones v. Moore Co. (Com'rs), 106 N. C. 436; State v. Health Board (State), 103 Mo. 22; State v. Wilmington Common Council, 3 Harr. 294; State v. Benton, 25 Neb. 834.

<sup>5</sup> Stockton, etc. R. R. v. Stockton, 51 Cal. 328.

held that where there is a clear and manifest abuse of discretion, as where a board, which has a discretion on that subject, should refuse to build a bridge, which is absolutely and essentially necessary for the enjoyment of an ancient highway,<sup>1</sup> or the board of trustees of a town, with a discretionary power in the matter, should refuse to provide for the improvement of the public streets, when the necessity for such action is so apparent and obvious as to justify the inference that they have determined not to discharge a plain duty,<sup>2</sup> the writ of *mandamus* will issue. In these cases it is evident that parol testimony would be required to prove such necessity. In proceedings to restore attorneys who have been disbarred by the courts, evidence is freely introduced, and the attorney is restored if it is found, that the court decided erroneously on the testimony, or the case is outside of the exercise of the lower court's discretion, or is one of irregularity, or against law, or of flagrant injustice, or without the jurisdiction of the lower court.<sup>3</sup>

§ 41. **The abuse of discretion must be flagrant.**— But the action of an officer in a matter which calls for the exercise of his discretion or judgment will not be reviewed by the writ of *mandamus*, unless he has been guilty of a clear and wilful disregard of his duty,<sup>4</sup> or such action is shown to be extremely wrong or flagrantly improper and unjust,<sup>5</sup> so that the decision can only be explained as the result of caprice, passion or partiality.<sup>6</sup> The weight of authority is evidently to the effect that such abuse of discretion can be proved by evidence in a *mandamus* proceeding, but the proof must be very clear and convincing, and the allegations thereof ought to state the grounds for such

<sup>1</sup> *State v. Essex (Freeholders)*, 23 N. J. L. 214.

<sup>2</sup> *Catlettsburg (Trustees) v. Kinner*, 13 Bush, 334.

<sup>3</sup> *State v. Kirke*, 12 Fla. 278; *Bradley, Ex parte*, 7 Wall. 364; *People v. Turner*, 1 Cal. 143.

<sup>4</sup> *State v. Benton*, 25 Neb. 834;

*Davis v. County Com'rs*, 63 Me. 396; *State v. Kirke*, 12 Fla. 278; *Vincent v. Bowes*, 78 Mich. 315; *Manor v. McCall*, 5 Ga. 522.

<sup>5</sup> *Burr, Ex parte*, 9 Wheat. 529; *R. v. Essex (Just.)*, 2 Chit. 385.

<sup>6</sup> *Detroit, etc. Co. v. Gartner*, 75 Mich. 360.

belief. Simply to say in a petition for a *mandamus* that the officer abused his discretion is merely to apply an epithet without defining the act.<sup>1</sup>

§ 42. **Writ of mandamus will not lie to undo what has been done.**—When there is nothing to be done but to enforce a legal duty, the writ of *mandamus* will lie, but if anything remains to be done or fact to be ascertained, the writ will not lie.<sup>2</sup> A *mandamus* was applied for to compel the county treasurer to pay a warrant of the board of police. The return stated that the warrant was to be paid in Confederate money. It was held that in such a proceeding the difference in value between such money and legal money could not be ascertained, and the writ was dismissed.<sup>3</sup> The writ lies to do what ought to be done and not to undo what ought not to have been done.<sup>4</sup> Where a corporation has affixed its seal to its register of shareholders, a *mandamus* to compel it to take its seal from such register was refused.<sup>5</sup>

§ 43. **Mandamus and injunction contrasted.**—*Mandamus* and injunction should not be confounded. The latter is used to prevent action, to maintain affairs *in statu quo*. The former is compulsory, commanding something to be done. An injunction is preventative and protective merely, and not restorative.<sup>6</sup> It interposes between the complainant and the injury he fears or seeks to avoid. If the injury be already done, the writ can have no operation, for it cannot be applied correctively so as to remove it. It is not used for the purpose of punishment, or to compel persons to do right, but simply to prevent them from doing wrong.<sup>7</sup> It is sometimes used as an affirmative remedy,

<sup>1</sup> Detroit, etc. Co. v. Gartner, 75 Mich. 360.

<sup>2</sup> Webster v. Newell, 66 Mich. 503.

<sup>3</sup> Clayton v. McWilliams, 49 Miss. 311.

<sup>4</sup> White's Creek T. Co. v. Marshall, 2 Baxt. 104; Burtis, Ex parte, 103 U. S. 238; Nash, Ex parte, 15 Q. B. 92.

<sup>5</sup> Nash, Ex parte, 15 Q. B. 92.

<sup>6</sup> Washington University v. Green, 1 Md. Ch. 97; Sherman v. Clark, 4 Nev. 138; Crawford v. Carson, 35 Ark. 565.

<sup>7</sup> Attorney-General v. New Jersey R. & T. Co., 3 N. J. Eq. 136.

but only by the chancery court to carry into effect its own decrees,<sup>1</sup> commanding the party not to allow things to continue in the condition in which they have been allowed to become.<sup>2</sup> *Mandamus*, however, is compulsory and requires the doing of an act.<sup>3</sup> It lies to command the doing of what ought to be done, and not to undo what has been done.<sup>4</sup> It does not revise nor correct action.<sup>5</sup> It cannot command to abstain from a tort or abuse of office.<sup>6</sup> It never had the effect of the old writ of *de molestando*.<sup>7</sup> It will be refused to prevent one claiming to be elected from exercising his office or to enjoin him from qualifying.<sup>8</sup> When officers requested a *mandamus* to prevent others from molesting them in the exercise of the functions and powers of their offices, the court refused the writ, stating that if the writ were issued for such cause, it would become merely a substitute for an injunction.<sup>9</sup> Such substitution will not be allowed.<sup>10</sup>

**§ 44. Are preliminary questions judicial or ministerial?**—It often happens that a ministerial duty exists, which may be enforced by the writ of *mandamus* provided certain facts exist. It becomes important to decide whether the determination as to the existence of such facts is a judicial or ministerial act. Hardly a case can be imagined when a public officer or tribunal is required to take action upon the happening of an event or upon the existence of a certain condition of things wherein there is not some dis-

<sup>1</sup> *Walkley v. City of Muscatine*, 6 Wall. 481.

<sup>2</sup> *Washington University v. Green*, 1 Md. Ch. 97.

<sup>3</sup> *Crawford v. Carson*, 35 Ark. 565; *Peat's Case*, 6 Mod. 229.

<sup>4</sup> *White's Creek T. Co. v. Marshall*, 2 Baxt. 104; *Burtis, Ex parte*, 103 U. S. 238; *Nash, Ex parte*, 5 Q. B. 92.

<sup>5</sup> *Harris, Ex parte*, 52 Ala. 87.

<sup>6</sup> *Reg. v. Peach*, 2 Salk. 572.

<sup>7</sup> *Peat's Case*, 6 Mod. 229.

<sup>8</sup> *People v. Ferris*, 76 N. Y. 326.

<sup>9</sup> *Legg v. Annapolis*, 42 Md. 203.

<sup>10</sup> *Crawford v. Carson*, 35 Ark. 565. In *Gayle v. Owen Co. Court*, 83 Ky. 61, a *mandamus* was considered to be the proper remedy to prevent the judge and the clerk of a county court from recording the vote upon a local option law when the law was unconstitutional. The law made such record conclusive that all the proceedings under it were regular. It is not seen why an injunction would not have been the proper remedy.



cretion to be exercised as to whether the event has happened, or whether the condition of things has occurred. A board canvassing election returns must determine whether the papers submitted to them as the returns are genuine. A marshal or sheriff, when a civil or criminal process is placed in his hands to be served, must determine whether he is serving or arresting the proper party or attaching the proper property. Any board or tribunal called on to act must determine whether the proper parties are before it, and whether the facts exist calling for its action. If such determination is judicial and is adverse to the taking of any action, such officer or board cannot be called on to do an act which it is his or its duty to do only in case the facts are different from such conclusion, because no judicial determination can be reviewed or overthrown in *mandamus* proceedings. If it should be held that in all cases the determination of such preliminary questions calls for the exercise of judicial discretion, the writ of *mandamus*, as has often been said, might as well be expunged from the remedial code. If such determination is not an exercise of judicial discretion, then the courts can review such determination, and, finding that the facts justify the demand, can order the performance of the ministerial act, which is a duty under those circumstances. In their conclusions on this question the courts are not in harmony.

§ 45. **English rule as to preliminary questions.**—The English courts have held that when a subordinate tribunal or board decides on a point, preliminary to the whole case, or to the reception of a particular piece of evidence, that it will not hear the case further, that such action is conclusive on any point involving a matter of fact only, and the writ will not issue; but if the point decided involves a matter which the court can see to be a question of law, the decision may be reviewed by this writ.<sup>1</sup> In a later case Lord Cock-

<sup>1</sup> Q. v. Kesteven (Just.), 3 Q. B. Reg. v. Liverpool, 1 Eng. L. & Eq. 810; R. v. Flintshire (Just.), 11 Jur. 291; Q. v. Brown, 7 Ellis & B. 757; 185; Q. v. Leicester, 15 Q. B. 671; Milner, Ex parte, 6 Eng. L. & Eq.

burn qualified this by saying, that if the question turned on a matter of fact, the circumstances must be very special to induce the court to interfere by this writ.<sup>1</sup>

§ 46. **American rule as to preliminary questions.**—The United States supreme court holds that, when it is necessary for the officer or tribunal to hear evidence to determine the question, the decision is judicial and not reviewable by *mandamus*.<sup>2</sup> In New York, when a subordinate body is vested with power to determine a question of fact, the duty is judicial.<sup>3</sup> In Missouri it is decided that if an inferior tribunal declines to hear a case upon what is termed a preliminary objection, and the objection is purely a matter of law, the writ will issue if such tribunal has misconstrued the law.<sup>4</sup> In fact most of the authorities agree that, if the tribunal dismisses the case under the mistaken conclusion that it has not jurisdiction thereof, its action will be reviewed by the writ, and it will be compelled to pass on the subject.<sup>5</sup> The writ was issued against the mayor of a city to compel him to sign an order against the city for the payment of money, though he was first required to satisfy himself that the claim was audited, that the city council had authority to appropriate money for such a claim, and that it had made the appropriation.<sup>6</sup> In Louisiana, when the court refuses to go into the trial of a case upon an erroneous construction of a question of law or of practice, preliminary to the whole case, this writ will issue.<sup>7</sup> In Texas it is considered to be immaterial whether the act is a preliminary one, but that the nature of the question on which the court is called to act, and the char-

371; *Q. v. Richards*, 20 L. J. Q. B. 351; *King v. Frieston* (Inhab.), 5 B. & Ad. 597.

<sup>1</sup> *R. v. Monmouth* (Mayor), L. R. 5 Q. B. 251.

<sup>2</sup> *Secretary v. McGarahan*, 9 Wall. 298.

<sup>3</sup> *People v. Troy* (Com. Coun.), 78 N. Y. 33.

<sup>4</sup> *Castello v. St. Louis Cir. Ct.*, 28 Mo. 259.

<sup>5</sup> *Parker, Ex parte*, 120 U. S. 737; *Beguhl v. Swan*, 39 Cal. 411; *State v. Laughlin*, 75 Mo. 358. See § 203.

<sup>6</sup> *State v. Ames*, 31 Minn. 440.

<sup>7</sup> *State v. Ellis*, 41 La. An. 41.

acter of the judgment which it must render, decide the nature of the act. Where a court dismissed an appeal because it considered that the appeal bond was insufficient, its action was considered to be judicial, and the writ was refused, though no appeal or writ of error was allowable.<sup>1</sup> In several other cases in other states, where the appeal was dismissed for lack of jurisdiction, either of the individual case or of any cases of that nature, such action was held to be judicial and therefore not reviewable by *mandamus*,<sup>2</sup> though there was no other remedy,<sup>3</sup> and sometimes for the additional reason that such a use of the writ of *mandamus* would convert it into a writ of error.<sup>4</sup> When a mayor was requested to call an election in accordance with the law, providing therefor in case fifty qualified voters signed the petition, and there was a surplus to territory, when a division thereof by vote was authorized, it was considered that his action in determining these two facts called for judgment and discretion, and upon his refusal to call the election, a writ against him, to compel him to do so, was refused.<sup>5</sup> The decision of an auditing officer is conclusive as to the amount which the law permits him to allow, but his decision as to whether the claim is in its nature within the statute is reviewable on *mandamus*.<sup>6</sup> In South Carolina the fact, that a reasonable doubt exists as to some necessary fact on which the duty of performance depends, does not interfere with the certainty of the duty, when the ascertainment of such fact is the proper subject of judicial inquiry, for in that case the officer, if doubtful as to the fact, may put the party demanding performance to proof of such fact in a proper judicial proceeding as in *mandamus*. It is admitted, how-

<sup>1</sup> *Ewing v. Cohen*, 63 Tex. 482.

<sup>2</sup> *People v. Dutchess C. Pleas* (Judges), 20 Wend. 658; *People v. Weston*, 28 Cal. 639; *Goheen v. Myers*, 18 B. Mon. 423.

<sup>3</sup> *People v. Garnett*, 130 Ill. 340.

<sup>4</sup> *Railway Co., Ex parte*, 103 U. S. 794; *Baltimore, etc. R. R., Ex*

*parte*, 108 U. S. 566; *Treadway v. Wright*, 4 Nev. 119. On this proposition the courts are much divided. See § 205, where the question is more fully considered.

<sup>5</sup> *Sansom v. Mercer*, 68 Tex. 488.

<sup>6</sup> *Black v. Auditor*, 26 Ark. 237.

ever, that a public officer or public body may be clothed with power to determine conclusively the existence of any fact as bearing on the performance of a public duty, in which case the courts will not review the decision arrived at.<sup>1</sup>

§ 47. **Subject continued.**— In several states, whether such preliminary questions are ministerial or judicial depends upon the general nature of the duties to be performed, no matter how many questions are to be decided or whether they involve matters of law or of fact.<sup>2</sup> In Nevada the rulings are very decided. “Whether the decision is judicial or ministerial depends upon the nature of the act to be commanded by the writ, and not upon the determination of preliminary questions. Such questions, no matter how difficult, must be determined by the officer in advance, and, if he refuse to do so, by the court, before the writ can issue. This applies whether such act is purely ministerial or judicial. Thus, before a judge settles a bill of exceptions, he must decide whether the party has a right to it, whether it is in proper form, and whether it is regularly presented. Such questions are certainly judicial; but if he errs in his conclusions, a *mandamus* will issue.”<sup>3</sup> Yet, when the board of county commissioners were required by law to order an election of county officers, if five hundred qualified voters petitioned therefor, it was held that the decision of such board, as to whether five hundred qualified voters so petitioned, was judicial, and the writ of *mandamus* was refused.<sup>4</sup> In Kentucky it was considered, that the officer’s decision on such preliminary question is only the decision of the other party to the *mandamus* proceeding, and should not bind his adversary, and that the court, which has power to issue the writ, must have power to determine all questions on which depend the propriety

<sup>1</sup> Morton v. Comptroller-General, 41 Mo. 221; Candee, Ex parte, 48 4 Rich. (N. S.) 430. Ala. 386.

<sup>2</sup> Manns v. Givens, 7 Leigh, 689; <sup>3</sup>State v. Murphy, 19 Nev. 89.  
Doolittle v. County Court, 28 W. <sup>4</sup>State v. Eureka Co. (Com’rs), 8 Va. 158; State v. Lafayette Co. Ct., Nev. 309.

of granting or refusing it;<sup>1</sup> yet in passing on the question of jurisdiction of an appeal from a justice of the peace, the court acts judicially, though it relates to a question preliminary to a decision on the merits, and a *mandamus* will not lie, no matter how erroneous the decision may be.<sup>2</sup> In California it is considered that such discretion only exists where the law has given such party power to decide the questions with intent that such decision shall be final,<sup>3</sup> and in Tennessee, unless changed by appeal or review. In Tennessee such discretion does not exist when the act to be done is ministerial upon a given state of facts, although the officers or tribunal or body must judge according to their best discretion whether the facts exist, or whether they should perform the act. In such cases their actions are reviewable by *mandamus*.<sup>4</sup> It is always held that the actions of sheriffs and marshals in serving writs are purely ministerial.<sup>5</sup> The duties of boards engaged in canvassing election returns are generally considered to be ministerial.<sup>6</sup> A judge may be required by *mandamus* to sign a bill of exceptions.<sup>7</sup> In fact, a great number of cases might be cited wherein the writ has been issued, though the decision on preliminary facts involved judgment and discretion.

§ 48. Summary of decisions on the subject.—The weight of authority seems to be that erroneous decisions as to preliminary questions of law may be reviewed by this writ; that erroneous decisions as to preliminary questions of fact may be reviewed, unless the general nature of the duties to be performed are considered to be judicial, or the law intended that such decision should be final. When, however, in a *mandamus* proceeding, the respondent admits the existence of the facts, concerning the determination of which alone was any judgment or discrimination authorized on his part, his duty becomes ministerial, and

<sup>1</sup> Page v. Hardin, 8 B. Mon. 648.

<sup>2</sup> Goheen v. Myers, 18 B. Mon. 423.

<sup>3</sup> Wood v. Strother, 76 Cal. 545.

<sup>4</sup> Morley v. Power, 73 Tenn. 691.

<sup>5</sup> Kentucky v. Denison, 65 U. S. 66.

<sup>6</sup> See *post*, § 178.

<sup>7</sup> See *post*, § 190.

the writ of *mandamus* will issue to compel its performance.<sup>1</sup>

§ 49. **Mandamus protects only substantial interests.**—The writ of *mandamus* has often been styled a high prerogative writ, the right arm of the law, and one of the flowers of the crown. It is not lightly called into exercise. It will only be used to protect a person from substantial injury,<sup>2</sup> or to secure or protect substantial rights.<sup>3</sup> Accordingly it has been held that it will not issue unless temporal rights are involved.<sup>4</sup> In some cases a restoration to membership in a corporation has been refused because such membership was not attended with fees or emoluments, and it was therefore considered that no pecuniary interest was involved.<sup>5</sup> This view is contrary to the weight of the decisions. Lord Mansfield said that the fact that a pecuniary interest was affected gave greater weight to the claim for this mode of redress; and then he was only referring to a function.<sup>6</sup> It would seem that in England the necessity for pecuniary interests being involved exists only in cases where restoration is sought to a function dissociated from public offices and from corporations,<sup>7</sup> since the writ has often been granted there relative to the election, admission or restoration to offices to which no emoluments or compensation were attached, as aldermen, vestrymen, church-wardens, overseers of the poor, poor-law guardians, town councilors,<sup>8</sup> and also to restore a person to his honorary degrees. Such degrees are only a civil honor. The court said that such a case was like that of an alderman,

<sup>1</sup> Henry v. Taylor, 57 Iowa, 72; Ill. 635; State v. St. Louis, etc. Co., Briggs v. Hopkins, 16 R. I. 83; 21 Mo. Ap. 526; State v. Odd Fellows' G. L., 8 Mo. Ap. 148; State v. Noble Co. (Com'rs) v. Hunt, 33 Ohio St. 169.

<sup>2</sup> State v. Bonnell, 119 Ind. 494.

<sup>3</sup> Pistorius v. Stempel, 81 Mich. 133.

<sup>4</sup> Union Church v. Sanders, 1 Houst. 100; Runkel v. Winemiller,

<sup>4</sup> Harris & McH. 429.

<sup>5</sup> People v. Masonic B. Assoc., 98

Anshei C. H. Cong., 37 Mich. 542; People v. Board of Trade, 80 Ill. 134.

<sup>6</sup> Rex v. Barker, 3 Burr. 1265.

<sup>7</sup> R. v. Blooer, 2 Burr. 1045; R. v. Jotham, 3 T. R. 575.

<sup>8</sup> R. v. Adams, 2 A. & E. 409;

R. v. Norwich, 1 B. & Ad. 310.

whose office of itself is of benefit only by consequence. Interest and property are the consequence of such degrees.<sup>1</sup> In America the writ has often been granted to restore persons to offices or memberships in corporations where there were no fees or emoluments; as visitors to a medical college,<sup>2</sup> trustees of an eleemosynary corporation,<sup>3</sup> and a member of a school committee.<sup>4</sup> The mere franchise of membership in a corporation is property,<sup>5</sup> and for that reason certain courts have issued the writ to compel a restoration to a membership coupled with no fees or emoluments.<sup>6</sup> In fact it has been claimed, that the writ should issue to compel the admission of a member into an incorporated society, where the advantages are personal rather than pecuniary, because in such case the loss is incapable of a money compensation.<sup>7</sup> Besides it is proper to issue this writ in such cases to any corporation, because the courts have such supervisory jurisdiction over them to see that they act agreeably to the end of their institution and that the king's charters are observed.<sup>8</sup>

§ 50. **The writ creates no new duty.**—The writ of *mandamus* never creates any new authority, nor does it confer a power which did not exist before.<sup>9</sup> It does not make duties, but lies to compel a party to do what was his duty without the writ.<sup>10</sup> Where, however, the officer has neglected to do his duty till the time for action by him *sua*

<sup>1</sup> King v. Cambridge, 8 Mod. 148.

<sup>2</sup> Lewis v. Whittle, 77 Va. 415.

<sup>3</sup> Fuller v. Plainfield Acad. School,  
6 Conn. 532.

<sup>4</sup> Conlin v. Aldrich, 98 Mass. 557.

<sup>5</sup> 2 Black. Com. 37.

<sup>6</sup> Medical, etc. Soc. v. Weatherly,  
75 Ala. 248; State v. Georgia Med.  
Soc., 38 Ga. 608; Com. v. Pennsylvania B. Inst., 2 S. & R. 141; Green  
v. African M. E. Soc., 1 S. & R. 254;  
Screwmen's B. Assoc. v. Benson, 76  
Tex. 552; White v. Brownell, 2  
Daly, 329; People v. Med. Soc. of

Erie Co., 24 Barb. 570; People v.  
Med. Soc. of Erie Co., 32 N. Y. 187.

<sup>7</sup> Freon v. Carriage Co., 42 Ohio  
St. 30.

<sup>8</sup> See § 157.

<sup>9</sup> State v. Buhler, 90 Mo. 560; People  
v. Hatch, 33 Ill. 9; State v. Ne-  
maha Co., 10 Neb. 32.

<sup>10</sup> Brownsville v. Loague, 129 U. S.  
769; United States v. Clark County,  
95 U. S. 769; Supervisors v. United  
States, 18 Wall. 71; People v. Gil-  
mer, 10 Ill. 242; People v. Chicago,  
etc. R. R., 55 Ill. 95.

*sponte* has expired, the writ will still issue, and in that sense alone may be considered to have given a new authority. Where a court failed during a certain term thereof to certify a case to an appellate court, as required by law, a *mandamus* was issued at a later period to compel such certification.<sup>1</sup> It is no objection to a *mandamus* to compel a judge to sign a bill of exceptions, that the period in which it should have been signed has passed, provided the relator presented it in due season, and the delay is due to the judge.<sup>2</sup> Officers cannot by their neglect deprive parties of their rights.

### § 51. Writ denied when there are other remedies.—

This writ is issued as a *dernier resort* and *ex debito justitiæ*.<sup>3</sup> Only in case all other remedies fail can this writ be appealed to, and it is then issued to prevent a failure of justice.<sup>4</sup> By this it is not meant that any other remedy will suffice, no matter how imperfect or inadequate it may be. In order to prevent the issuance of this writ, such remedy must be a plain,<sup>5</sup> speedy,<sup>6</sup> adequate<sup>7</sup> and specific<sup>8</sup> legal

<sup>1</sup> State v. Philips, 96 Mo. 570.

<sup>2</sup> See § 192.

<sup>3</sup> People v. Head, 25 Ill. 325.

<sup>4</sup> People v. New York (Mayor), 10 Wend. 393; Milliken v. City of Weatherford, 54 Tex. 388; Haymore v. Com'rs of Yadkin, 85 N. C. 268; Prop'rs St. Luke's Church v. Slack, 7 Cush. 226; People v. State Prison Insp'rs, 4 Mich. 187; State v. Teasdale, 21 Fla. 652; Napier v. Poe, 12 Ga. 170; Arrington v. Van Houton, 44 Ala. 284; Fitch v. McDeamid, 26 Ark. 432; Runion v. Latimer, 6 S. C. 126; Com. v. Com'rs, 16 S. & R. 317; Arberry v.

Beavers, 6 Tex. 457; Rowland, Ex parte, 104 U. S. 604; People v. State Treas., 24 Mich. 468.

<sup>5</sup> Evans v. Thomas, 32 Kans. 469; State v. New Orleans, etc. R. R., 37 La. An. 589; State v. Gracey, 11 Nev. 223; Marshall v. Sloan, 35 Iowa, 445; People v. Hawkins, 46 N. Y. 9; State v. Fremont, etc. R. R., 22 Neb. 313.

<sup>6</sup> Babcock v. Goodrich, 47 Cal. 488; Fremont v. Crippen, 10 Cal. 211; Pickell v. Owen, 66 Iowa, 485; Marshall v. Sloan, 35 Iowa, 445; State v. Gracey, 11 Nev. 223.

<sup>7</sup> People v. McLane, 62 Cal. 616;

<sup>8</sup> Buffalo, etc. R. R. v. Allegheny (Com.), 120 Pa. St. 537; Excelsior, etc. Ass'n v. Riddle, 91 Ind. 84; State v. Fuller, 18 S. C. 246; Starnes v. Tanner, 73 Ga. 144; Du Bose, Ex parte, 54 Ala. 278; Attorney-General

v. Boston, 123 Mass. 460; Rex v. Barker, 3 Burr. 1265; Rex v. Windham, Cowp. 377; Legg v. City of Annapolis, 42 Md. 203; R. v. Archbishop, 8 East, 213; Prop'rs St. Luke's Church v. Slack, 7 Cush. 226.



remedy in the ordinary course of law.<sup>1</sup> It is immaterial whether such remedy be provided by statute<sup>2</sup> or furnished by the common law.<sup>3</sup> In some of the states these rules have been varied by statutes which authorize the issuance of this writ in all cases to which it is applicable, regardless of the existence of other remedies.<sup>4</sup>

§ 52. **Other remedy must be speedy.**—Such other remedy must be speedy. The canvassers of an election were compelled by *mandamus* to re-assemble and count all the votes. They had thrown out some votes which the court had decided should be counted. Though the law provided for a suit to contest the election, the court considered such remedy to be neither speedy nor adequate.<sup>5</sup> For the same reason the writ was allowed against a city on a claim for services rendered.<sup>6</sup> But this writ is not granted because it is more speedy than any other remedy,<sup>7</sup> for, in that case, it might always be applied for. It is issued when the delay attending any other remedy would allow material injury to ensue.<sup>8</sup> Where the law provided that the county com-

George's, etc. Co. v. Co. Com'rs, 59 Md. 255; People v. Board of Police, 107 N. Y. 235; Mobile & O. R. R. v. Wisdom, 5 Heisk. 125; Blair v. Marye, 80 Va. 485; Leigh v. State, 69 Ala. 261; Virginia Com'rs, Ex parte, 112 U. S. 177; Ewing v. Cohen, 63 Tex. 482; State v. Burnside, 33 S. C. 276; Barnett v. Dir. Ind. Dist., 73 Iowa, 134; Shine v. Kentucky C. R. R., 85 Ky. 177; State v. Appleby, 25 S. C. 100; State v. Sheboygan Co. (Sup'rs), 29 Wis. 79; Com. v. Pittsburgh, 34 Pa. St. 496; Peck v. Booth, 42 Conn. 271; People v. Highway Com'rs, 88 Ill. 141; People v. State Treas., 24 Mich. 468; Q. v. Exeter (Chapter), 12 A. & E. 512.

<sup>1</sup> Q. v. Registrar, 21 Q. B. D. 131; Com. v. Allegheny Co. (Com'rs), 16 S. & R. 317; United States v. Bank of Alexandria, 1 Cranch, C. C. 7;

Williams v. Judge, 27 Mo. 225; People v. Branch Cir. Ct. (Judges), 1 Doug. (Mich.) 319.

<sup>2</sup> State v. Wickham, 65 Mo. 634; Barksdale v. Cobb, 16 Ga. 13; Ottawa v. People, 48 Ill. 233.

<sup>3</sup> Kaine v. Com., 101 Pa. St. 490; Mackey, Ex parte, 15 S. C. 322; Wilkins v. Mitchell, 3 Salk. 229.

<sup>4</sup> Blair v. Marye, 80 Va. 485; O. & M. R. R. v. People, 121 Ill. 483; Gardner v. Haney, 86 Ind. 17; Indianapolis v. McAvoy, 86 Ind. 587. In Indiana, however, this writ cannot be resorted to in the first instance. Harrison S. T. v. McGregor 96 Ind. 185.

<sup>5</sup> State v. Stearns, 11 Neb. 104.

<sup>6</sup> State v. Ames, 31 Minn. 440.

<sup>7</sup> Ottawa v. People, 48 Ill. 233; People v. Salomon, 46 Ill. 415.

<sup>8</sup> Tawas, etc. R. R. v. Iosco Circuit Judge, 44 Mich. 479.

missioners should determine which of two townships had erroneously collected taxes from the owner of certain lands, the court held that a *mandamus* would lie to compel them so to determine, regardless of the existence of any other remedy, because it was apparent that the statute was meant to provide a cumulative, simpler, less expensive and more speedy remedy than existed before.<sup>1</sup>

**§ 53. Other remedy must be adequate.**—Such other remedy must be adequate. Such remedy is adequate when it reaches the end intended, and actually compels the performance of the duty which has been neglected or refused.<sup>2</sup> It must apply to the case, and afford the particular right to which the party is entitled.<sup>3</sup> Anything which falls short of that is not adequate nor complete. The indictment of the officer,<sup>4</sup> or an action on the case for damages for neglect of duty,<sup>5</sup> generally does not accomplish the performance of the neglected duty, and is not an adequate remedy. The writ has been refused: when the board of supervisors denied the relief desired, because an appeal lay from their decision;<sup>6</sup> to compel a corporation to file their tax statement as required by law, because the auditor of the county was authorized to make it for them if they failed to do so;<sup>7</sup> to compel the clerk of the police court to pay the fees of the prosecuting attorney, since he had a right of action;<sup>8</sup> to compel a town trustee to transfer a person for school

<sup>1</sup> *People v. Essex County (Board of Sup'rs)*, 70 N. Y. 228.

<sup>2</sup> *Porter Township (Overseers) v. Jersey Shore (Overseers)*, 82 Pa. St. 275.

<sup>3</sup> *Etheridge v. Hall*, 7 Porter, 47; *Williamsburg (Trustees)*, In re, 1 Barb. 34; *Fremont v. Crippen*, 10 Cal. 211; *Babcock v. Goodrich*, 47 Cal. 488.

<sup>4</sup> *Porter Township (Overseers) v. Jersey Shore (Overseers)*, 82 Pa. St. 258; *State v. Whitworth*, 76 Tenn. 594; *People v. New York (Mayor)*, 10 Wend. 393; *People v. State Au-*

*ditor*, 42 Mich. 422; *King v. Nottingham O. W. W.*, 6 A. & E. 355; *Trenton, etc. Co.*, In re, 20 N. J. L. 659; *State v. Wilmington Bridge Co.*, 3 Harr. 812.

<sup>5</sup> *Fremont v. Crippen*, 10 Cal. 211; *Babcock v. Goodrich*, 47 Cal. 488; *McCullough v. Brooklyn (Mayor)*, 23 Wend. 458; *Mobile & O. R. R. v. Wisdom*, 5 Heisk. 125.

<sup>6</sup> *State v. Sheboygan Co. (Sup'rs)*, 29 Wis. 79.

<sup>7</sup> *Louisville, etc. R. R. v. State*, 25 Ind. 177.

<sup>8</sup> *Colley v. Webster*, 59 Conn. 361.

purposes to another township, because an appeal lay to the county examiner;<sup>1</sup> in all cases where appeals are allowed to other courts, boards or officers;<sup>2</sup> to make the registrar of joint-stock companies file an agreement which he refused to file because the tax was not paid, for the reason that the law provided another remedy;<sup>3</sup> to compel the admission of a colored child to a public school, because the father could bring suit;<sup>4</sup> to recover moneys expended or misapplied by public officers, because suit could be brought;<sup>5</sup> to make a railroad keep a street in repair in accordance with its contract, because suit could be brought on its contract;<sup>6</sup> to compel city authorities to audit a bill for services, since an action at law would lie;<sup>7</sup> to make a judge sign a bill of exceptions, since the law provided that by-standers might do so upon his refusal;<sup>8</sup> to enforce the contract of a county to pay for volunteers, since an action at law lies;<sup>9</sup> to compel a county treasurer to pay county warrants, though he has the money, since there is a remedy on his bond,<sup>10</sup> and to make a corporation pay a dividend it has declared.<sup>11</sup> Where, however, a remedy by appeal,<sup>12</sup> *certiorari*,<sup>13</sup> or *quo warranto*,<sup>14</sup> is not considered under the circumstances to be a sufficient remedy, the writ will issue. In some cases a criminal proceeding has been considered sufficiently efficacious to accomplish the result desired, and accordingly the writs were refused. A *mandamus* was re-

<sup>1</sup> Fogle v. Gregg, 26 Ind. 345.

<sup>6</sup> State v. New Orleans, etc. R. R.,

<sup>2</sup> State v. Platte Co. (County Ct.), 83 Mo. 539; Chambers, Ex parte, 10 Mo. Ap. 240; State v. Marshall, 82 Mo. 484; Shine v. Kentucky C. R. R., 85 Ky. 177; Mackey, Ex parte, 15 S. C. 322; State v. Baltimore (Co. Com'r's), 46 Md. 621; Barksdale v. Cobb, 16 Ga. 13; Boone County (Board Comr's) v. State, 38 Ind. 193; Marshall v. Sloan, 35 Iowa, 445.

37 La. An. 589.

<sup>7</sup> Wheelock v. Auditor, 130 Mass. 486.

<sup>8</sup> State v. Wickham, 65 Mo. 634.

<sup>9</sup> State v. Howard Co., 39 Mo. 375.

<sup>10</sup> State v. Bridgman, 8 Kans. 458.

<sup>11</sup> People v. Central, etc. Co., 41 Mich. 166.

<sup>12</sup> Careaga v. Fernald, 66 Cal. 351.

<sup>13</sup> State v. County Com'r's, 83 Ala. 304.

<sup>3</sup> Q. v. Registrar, 21 Q. B. D. 131.

<sup>4</sup> Kaine v. Com., 101 Pa. St. 490.

<sup>14</sup> Lewis v. Whittle, 77 Va. 415.

<sup>5</sup> Elder v. Washington Ter., 3 Wash. T. 438.

fused against the treasurer of a county to make him pay the costs of a witness in a felony case, pursuant to an order of the borough court of sessions, because an attachment was allowable on an indictment for disobedience.<sup>1</sup> A *mandamus* to open a highway was refused where the real object was to remove obstructions from it, since an indictment lay against the offender, and upon his conviction it was the duty of the court to order the sheriff to remove the obstructions.<sup>2</sup> The writ was refused to make a ministerial officer obey the orders of the quarter sessions, since indictment was the proper remedy.<sup>3</sup> When the parties have a sufficient remedy in their own hands, the writ will be refused. It was refused: to compel the land-owners to amend and repair certain river banks, which they were liable to repair *ratione terminæ*, since the relators, the conservators of Bedford Level, had the authority of commissioners of sewers;<sup>4</sup> and to the overseers of the poor to produce their accounts to the auditor appointed by the poor-law commissioners, since the auditor need not allow their accounts unless the particulars are furnished to him.<sup>5</sup> It is no reply to the application for this writ, that another proceeding may attain the same object. The relator has a right to deal with the existing state of things, and is not bound to abandon them.<sup>6</sup> The plain, adequate and speedy remedy by an ordinary action, which will defeat the right to a *mandamus*, must be a remedy against the respondent in the *mandamus* proceeding, and not against third persons. To a *mandamus* against a board of county canvassers to reconvene, count the votes and declare the proper result, it is no defense to answer that the relator may have a *quo warranto* against the person declared to be elected.<sup>7</sup> To a *mandamus* to the auditor to issue a warrant for the relator's salary as

<sup>1</sup> King v. Surrey (Treas.), 1 Chit. 650.

<sup>2</sup> Hale (Com'rs Highways) v. People, 73 Ill. 203.

<sup>3</sup> King v. Bristow, 6 T. R. 168.

<sup>4</sup> Q. v. Gamble, 11 A. & E. 69.

<sup>5</sup> Q. v. Halifax (Overseers Poor), 10 L. J. M. C. 81.

<sup>6</sup> King v. East India Co. (Directors), 4 B. & Ad. 530.

<sup>7</sup> People v. Greene Co. (Sup'rs), 12 Barb. 217.

the superintendent of schools, it is no defense that he has paid the salary to another, since the relator cannot be compelled to exhaust his remedies against the other.<sup>1</sup> Where a judgment for personal injuries sustained was obtained against a town and an individual, the judgment creditor was allowed a *mandamus* to compel the town authorities to levy a tax to pay the judgment, though the other defendant had property subject to levy. The creditor had a right to compel the town by this proceeding to pay him, and to refuse to him this writ, even though its issuance produced a circuitry of actions, would be an interference with his rights.<sup>2</sup> To prevent the issuance of this writ there must be a specific, adequate and legal remedy, competent to afford relief upon the very subject-matter of his application.<sup>3</sup> If, however, it is doubtful whether there is another adequate remedy, or the court cannot clearly see its way to one, the writ will issue.<sup>4</sup> The court is guided in its decision by the nature of the right itself, without regard to the special circumstances of the particular case.<sup>5</sup> So if it is doubtful whether the party is entitled to the writ, the court will often order the rule or issue the alternative writ, and allow the matter to be fully considered and finally decided at the hearing.<sup>6</sup>

§ 54. **Other remedy must be specific.**—Such other remedy must be specific. A specific remedy is one which will place the party in the position he occupied before the act complained of,<sup>7</sup> or would have occupied had the duty been performed,<sup>8</sup> or will afford relief upon the very subject-matter of his application.<sup>9</sup> A *mandamus* to compel the transfer of stock of a corporation was allowed, because, though an action for damages might be an adequate remedy, yet the

<sup>1</sup> Williams v. Clayton (Utah, Mar. 8, 1889), 21 Pac. Rep. 398.

<sup>2</sup> Palmer v. Stacy, 44 Iowa, 340.

<sup>3</sup> State v. Wright, 10 Nev. 167.

<sup>4</sup> Rex v. Nottingham O. W. W., 1 N. & P. 480; Ottawa v. People, 48 Ill. 233; Baker v. Johnson, 41 Me. 15; State v. Wright, 10 Nev. 167.

<sup>5</sup> R. v. Victoria Park Co., 1 Q. B. 288.

<sup>6</sup> Queen v. Heathcote, 10 Mod. 48.

<sup>7</sup> Etheridge v. Hall, 7 Port. 47.

<sup>8</sup> Sessions v. Boykin, 78 Ala. 328.

<sup>9</sup> State v. Wright, 10 Nev. 167; Raisch v. Board of Education, 81 Cal. 542.

relator was entitled to the specific relief of being admitted to the corporation as a stockholder, and being allowed to participate in its franchises.<sup>1</sup> It has been held that the writ will issue, though there is a specific legal remedy, if that remedy has become obsolete.<sup>2</sup> Such ruling may be appropriate in England, where legal practice has been systematized by the accretions and changes of centuries, but would hardly be accepted in America, where the obsolete portions of the English law were never adopted.

§ 55. **Other remedy must be a legal remedy.**—Such other remedy must be a legal remedy in the ordinary course of law.<sup>3</sup> Though it seems that in early times the writ of *mandamus* was occasionally issued from a court of chancery, yet it is now held to be exclusively a legal remedy.<sup>4</sup> Consequently the existence of a specific equitable remedy is not a ground for refusing the writ.<sup>5</sup> It is only an element to be taken into consideration by the court in exercising its discretion as to whether it will issue the writ.<sup>6</sup> The writ will not lie where there is a legal remedy by action.<sup>7</sup> The writ has been refused, because an action would lie against the county: to compel the county court to allow a claim against the county;<sup>8</sup> to compel the county supervisors to allow a claim;<sup>9</sup> and to make the board of police provide for the payment of a warrant.<sup>10</sup> Where the law specifically provided another remedy the writ was refused: to make

<sup>1</sup> *Memphis, etc. Co. v. Pike*, 9 Heisk. 697.

<sup>2</sup> *Stephen's Nisi Prius*, 2291; *King Williams (Justices) v. Munday*, 2 Leigh, 165.

<sup>3</sup> *Baker v. Johnson*, 41 Me. 15; *Tarver v. Tallapoosa (Com'rs Court)*, 17 Ala. 527.

<sup>4</sup> *Ante*, § 3.

<sup>5</sup> *People v. State Treasurer*, 24 Mich. 468; *Phoenix Iron Co. v. Com.*, 113 Pa. St. 563; *R. v. Archbishop*, 8 East, 213; *R. v. Stafford (Marquis)*, 3 T. R. 646. *Contra*, as

to private corporations, *Freon v. Carriage Co.*, 42 Ohio St. 30.

<sup>6</sup> *Tawas, etc. R. R. v. Circuit Judge*, 44 Mich. 479; *People v. New York (Mayor)*, 10 Wend. 393.

<sup>7</sup> *People v. Chenango Co. (Sup'rs)*, 11 N. Y. 563; *Lynch, Ex parte*, 2 Hill, 45.

<sup>8</sup> *State v. Floyd Co. (Judge)*, 5 Iowa, 380.

<sup>9</sup> *Crandall v. Amador Co.*, 20 Cal. 72.

<sup>10</sup> *Beaman v. Leake Co. (Board of Police)*, 42 Miss. 237.

the county officers move their offices;<sup>1</sup> to compel the tax collector to pay his collections into the parish treasury;<sup>2</sup> and to compel a railroad to receive and transport freight without charging discriminatory rates.<sup>3</sup> The writ was refused: to compel an officer to surrender to the county commissioners a room in the court-house, which they had formerly assigned to him, because they had full control of the court-house and could bring ejectment;<sup>4</sup> to make the owners of a new bridge, which interfered with the receipts of an earlier bridge, pay to the owners of the latter a certain sum of money as provided by law, because an action of debt lay;<sup>5</sup> to make the board of supervisors levy a tax to pay an order from them on the county treasurer, because suit could be brought;<sup>6</sup> to make the county treasurer pay bonds issued to a railroad from money received by him from a tax levied by law for that purpose, because there was sufficient remedy on his bond.<sup>7</sup> The writ will issue though it determines but one step in the controversy, and though it may still be necessary to resort to an injunction, a *quo warranto* or a contest of an election.<sup>8</sup>

**§ 56. Relator must show a clear legal right.**— The writ will not lie unless the relator shows a clear legal right to have the thing done which he asks for.<sup>9</sup> If the right be doubtful the writ will be refused.<sup>10</sup> A party put in a bid

<sup>1</sup> State v. Stockwell, 7 Kans. 98.

<sup>2</sup> State v. Boullet, 26 La. An. 259.

<sup>3</sup> State v. Mobile, etc. R. R., 59 Ala. 321.

<sup>4</sup> Washoe Co. Com'rs v. Hatch, 9 Nev. 357.

<sup>5</sup> Q. v. Hull, etc. R. R., 6 Ad. & E. (N. S.) 70.

<sup>6</sup> People v. Clark Co. (Board of Sup'rs), 50 Ill. 213.

<sup>7</sup> State v. McCrillus, 4 Kans. 250.

<sup>8</sup> State v. Marshall County (Judge), 7 Iowa, 186.

<sup>9</sup> Chicago, etc. R. R. v. Suffern, 129 Ill. 274; Burnsville T. Co. v. State, 119 Ind. 382; State v. Bonnell, 119 Ind. 494; King v. Canterbury

(Archb.), 8 East, 213; State Board of Education v. West Point, 50 Miss. 638; Morris, Ex parte, 11 Grat. 292; State v. Hastings, 10 Wis. 518; Commonwealth v. Mitchell, 82 Pa. St. 343; People v. Chenango Co. (Sup'rs), 11 N. Y. 563; Tarver v. Tallapoosa (Com'rs Ct.), 17 Ala. 527; State v. Omaha (Mayor), 14 Neb. 265; People v. Police Board, 107 N. Y. 235; Bayard v. United States, 127 U. S. 246; Leigh v. State, 69 Ala. 261; Huckabee, Ex parte, 71 Ala. 427; State v. Appleby, 25 S. C. 100; Atchison v. Lucas, 83 Ky. 451.

<sup>10</sup> Beaman v. Leake Co. (Board Police), 42 Miss. 237; Townes v. Nichols,

for a contract. The law required an approval of his bid by the common council before the contract was let. Until the contract was let he had no right of action. The common council might think it inexpedient to do the work, or that the prices were too high. The lowest bidder has no cause of action even if the contract is let to a higher bidder. His petition to compel the letting of the contract to him was refused.<sup>1</sup> The writ was refused: to compel a sheriff to levy on property standing in the wife's name, which the execution creditor asserted belonged to the husband, since there was no clear legal right till the question of ownership was determined;<sup>2</sup> to compel the mayor to sign a warrant drawn by the comptroller on the city treasurer, it being doubtful who was entitled to the money, another party having sued the city therefor;<sup>3</sup> to compel the county treasurer to pay a claim allowed by the board of supervisors, it being clear that the supervisors were imposed on;<sup>4</sup> to compel a county treasurer to pay an order legally drawn on funds in his hands, when from extraneous circumstances a well-founded doubt arose as to the right of the applicant to receive it and of the officer to pay it;<sup>5</sup> because the law was so vague that the right was doubtful;<sup>6</sup> because the relator showed no interest whatever in the matter;<sup>7</sup> to make the city treasurer accept \$100 so that the relator might demand from the clerk a license to sell liquor, because such a license is not a contract, and he would thereby acquire no legal right.<sup>8</sup> The writ is not granted to enforce rights not of a legal but of a mere equitable nature, no matter how great the inconvenience.<sup>9</sup>

73 Me. 515; *State v. Burnside*, 33 S. C. 276; *State v. Washington Co. (Board Sup'rs)*, 2 Chand. 247; *Mobile, etc. R. R. v. People*, 132 Ill. 559; *People v. Salomon*, 46 Ill. 415; *State v. Grubb*, 85 Ind. 213; *People v. Davis*, 93 Ill. 133; *State v. Buhler*, 90 Mo. 560; *Free Press Asso. v. Nichols*, 45 Vt. 7.

<sup>1</sup> *People v. Croton Aqueduct Board*, 26 Barb. 240.

<sup>2</sup> *State v. Craft*, 17 Fla. 722.

<sup>3</sup> *People v. Booth*, 49 Barb. 31.

<sup>4</sup> *People v. Wendell*, 71 N. Y. 171.

<sup>5</sup> *People v. Johnson*, 100 Ill. 537.

<sup>6</sup> *State v. Washington Co. (Board Sup'rs)*, 2 Chand. 247; *State v. Verner*, 30 S. C. 277.

<sup>7</sup> *State v. Davis County (Co. Judge)*, 2 Iowa, 280.

<sup>8</sup> *State v. Bonnell*, 119 Ind. 494.

<sup>9</sup> *Rugby Charity Trustees, Ex*



A transferee of stock merely by delivery was refused this writ to compel a transfer of the stock by the corporation on its books, because he was merely an equitable assignee.<sup>1</sup> The title must be complete. The writ does not lie if the title is inchoate,<sup>2</sup> even though growing out of statutory duty,<sup>3</sup> nor if the legal right has not been ascertained;<sup>4</sup> it does not lie to establish a right, but is used to enforce a right after its establishment.<sup>5</sup> A person asked for a *mandamus* to compel a member of a board and its clerk to recognize him as a member of the same board, though another party had been commissioned and was acting as such member, and though in a *quo warranto* proceeding brought by such other party he was perpetually enjoined from claiming the office. The *quo warranto* case was then pending on appeal. The court considered that the relator's claim was not clear and refused the writ.<sup>6</sup>

§ 57. **Obligation on respondent to do the act must be absolute.**—This writ will not lie unless the act desired is of absolute obligation on the part of the person sought to be coerced.<sup>7</sup> The relator must show not only a clear legal right to have the thing done, but also by the person sought to be coerced,<sup>8</sup> in the manner sought,<sup>9</sup> and that he still has

parte, 9 D. & R. 214; *King v. Canterbury* (Archb.), 8 East, 213; *Lords Kenyon and Buller in R. v. Abrahams*, 4 Q. B. 157; *King v. Stafford*, 3 T. R. 646; *Heffner v. Commonwealth*, 28 Pa. St. 108.

<sup>1</sup> *Burnsville T. Co. v. State*, 119 Ind. 382.

<sup>2</sup> *Harris, Ex parte*, 52 Ala. 87; *Chance v. Temple*, 1 Iowa, 179; *People v. Brooklyn (City)*, 1 Wend. 318.

<sup>3</sup> *Heffner v. Commonwealth*, 28 Pa. St. 108.

<sup>4</sup> *Porter Township (Overseers) v. Jersey Shore (Overseers)*, 82 Pa. St. 275.

<sup>5</sup> *Hays, Ex parte*, 26 Ark. 510.

<sup>6</sup> *Swartz v. Lange* (Kans., Nov. 7, 1891), 27 Pac. Rep. 992.

<sup>7</sup> *R. v. Fowey (Mayor)*, 2 B. & C. 584; *Morton v. Compt. Gen.*, 4 Rich. (N. S.) 430; *Runion v. Latimer*, 6 S. C. 126; *Chicago, etc. R. R. v. Suffern*, 129 Ill. 274.

<sup>8</sup> *State v. St. Louis, etc. Co.*, 21 Mo. Ap. 526; *State v. Omaha (Mayor)*, 14 Neb. 265; *People v. Klokke*, 92 Ill. 134; *Highways (Com'rs) v. People*, 99 Ill. 587; *State v. Jacobus*, 2 Dutch. 135.

<sup>9</sup> *People v. Spruance*, 8 Colo. 307; *Daniels v. Miller*, 8 Colo. 542; *Aspen (Mayor) v. Aspen, etc. Co.*, 10 Colo. 191; *Highways Com'rs v. People*, 66 Ill. 339.

it in his power to perform the duty required.<sup>1</sup> The action sought must not only be in the respondent's power to do, but it must be his duty to do it.<sup>2</sup> The act must be clearly prescribed and enjoined by law.<sup>3</sup> The duty must be plain<sup>4</sup> and positive.<sup>5</sup> Where the law only required a county auditor to draw his warrant for claims audited by himself, a *mandamus* was refused to make him issue his warrant on the county treasurer for a claim audited and allowed by the board of supervisors.<sup>6</sup> A duty, which involved a decision that a law was unconstitutional, was not considered to be plain.<sup>7</sup> A *mandamus* against the commissioners of highways to lay out a road was refused, because a *certiorari* in the proceedings relative thereto had been taken, which stayed all action, and it could not be considered to be a clear duty on the part of the commissioners to lay out the road.<sup>8</sup> The clerk of a board of supervisors was compelled to put the county seal on a warrant issued by his predecessor, who had neglected to do it, such duty being considered to be imperative.<sup>9</sup> A city clerk will not be required to perform acts demanded of him by the board of trustees, when such duties are not prescribed for him in the city charter, nor in the ordinances passed thereunder.<sup>10</sup> A police commissioner, who at the request of the other commissioners kept memoranda of their nominations and agreed to notify the common council thereof, could not be required to correct such memoranda, since he was merely rendering a service and was not required to keep the memoranda.<sup>11</sup> When there is a sub-

<sup>1</sup> *People v. Hayt*, 66 N. Y. 606.

<sup>2</sup> *Aspen (Mayor) v. Aspen, etc. Co.*, 10 Colo. 191; *State v. Zanesville, etc. Co.*, 16 Ohio St. 308; *Arberry v. Beavers*, 6 Tex. 457.

<sup>3</sup> *Puckett v. White*, 22 Tex. 559; *Q. v. Radnorshire (J.)*, 15 L. J. (N. S.) 151, M. C.; *Mobile, etc. R. R. v. Wisdom*, 5 Heisk. 125; *Winters v. Busford*, 6 Cold. 328.

<sup>4</sup> *Draper v. Noteware*, 7 Cal. 276.

<sup>5</sup> *State v. Appleby*, 25 S. C. 100;

*Cutting, Ex parte*, 94 U. S. 14; *Mad-dox v. Neal*, 45 Ark. 121.

<sup>6</sup> *Draper v. Noteware*, 7 Cal. 276.

<sup>7</sup> *Lynch, Ex parte*, 16 S. C. 32; *State v. Hagood*, 30 S. C. 519.

<sup>8</sup> *Highway Com'rs v. People*, 99 Ill. 587.

<sup>9</sup> *Prescott v. Gonser*, 34 Iowa, 175.

<sup>10</sup> *Napa (City) v. Rainey*, 59 Cal. 275.

<sup>11</sup> *Pond v. Parrott*, 42 Conn. 13.

stantial doubt as to the officer's duty, the writ will be refused.<sup>1</sup> Such doubt means a doubt on the part of the court after an examination of the law. The doubt, no matter how strong or honest, which the party may have as to his duty in the premises, has nothing to do with the question.<sup>2</sup> It was held in one instance, that the writ would not be refused where there was a doubt as to the duty, arising from the construction or the effect and meaning of a judicial order.<sup>3</sup> In another case, where a judgment was ambiguous, having two constructions, a *mandamus* to make the clerk of the court issue an execution thereon was refused.<sup>4</sup> A magistrate was not required to issue a warrant and commit a party to prison for not paying a fine, it being doubtful whether he was required to do so, the law saying "it shall be lawful" for him to do so.<sup>5</sup> A *mandamus* to make a city treasurer accept \$100 from the relator, so that he might demand from the city clerk a license to sell liquor, was refused, because his old license had not expired, and the clerk was not bound to issue a license before the time.<sup>6</sup> A writ to compel the admission of a person to the freedom of a corporation was refused, because the by-law on that subject was not imperative.<sup>7</sup> A *mandamus* was refused to compel a mayor of a town to issue a distress warrant on a conviction rendered by him, because the conviction, and alleged law governing the case, were open to grave objections, which the court did not consider it was called on to decide in such a proceeding.<sup>8</sup>

**§ 58. Mandamus not lie if act only to be done on approval of another.**—Where the act is only to be done in case another party approves thereof, a *mandamus* to com-

<sup>1</sup> People v. Johnson 100 Ill. 537; State v. Grubb, 85 Ind. 213; State v. Buhler, 90 Mo. 560; Greener v. Moore, 6 Colo. 526; Arberry v. Beavers, 6 Tex. 457; Com. v. County Com'rs, 5 Rawle, 45; Highway Com'rs v. People, 99 Ill. 587.

<sup>2</sup> State v. Auditor, 43 Ohio St. 311.

<sup>3</sup> Larkin v. Harris, 36 Iowa, 93.

<sup>4</sup> Hall v. Stewart, 23 Kans. 396.

<sup>5</sup> Rex v. Broderip, 5 B. & C. 239.

<sup>6</sup> State v. Bonnell, 119 Ind. 494.

<sup>7</sup> Rex v. Eye (Bailiffs), 1 B. & C.

<sup>8</sup> Regina v. Ray, 44 Up. Can. Q. B.

pel such action will not lie. Where it was the duty of a vestry to construct certain sewers, the plans whereof were first to be approved by the metropolitan board of works, a *mandamus* to compel the construction of the sewers was refused, though it was stated that a *mandamus* might lie to compel the vestry to go before the board with its plans and to procure its approval thereof.<sup>1</sup>

§ 59. **There must be an officer to do the act desired.**—Before the writ will issue there must be an officer in being with power and duty to do the act. The writ will not run to a person who was elected to an office but refused to qualify. He cannot be treated as a *de facto* officer.<sup>2</sup>

§ 60. **Corollaries from preceding sections.**—From the rules stated in the preceding sections certain propositions may be deduced which may be considered to be corollaries thereof. A court cannot order an officer to do an act which, without the order of the court, would not be his legal duty,<sup>3</sup> or which he could not lawfully do,<sup>4</sup> an act beyond the duties enjoined upon him by law as pertaining to his office or position,<sup>5</sup> an act not authorized by law,<sup>6</sup> an act which is illegal,<sup>7</sup> or an act which was legal but has become illegal prior to the time for issuing the writ.<sup>8</sup> Since the writ only issues to enforce the law as it stands, it will not be used to enforce a *casus omissus* in the law.<sup>9</sup> An officer will not be compelled to issue a license to sell liquors,

<sup>1</sup> *Q. v. St. Luke's Vestry*, 31 L. J. Q. B. 50.

<sup>2</sup> *State v. Beloit* (Sup'rs), 21 Wis. 280.

<sup>3</sup> *Greener v. Moore*, 6 Colo. 658.

<sup>4</sup> *State v. Orphans' Court* (Judge), 15 Ala. 740; *Johnson v. Lucas*, 11 Humph. 306.

<sup>5</sup> *Davis v. Porter*, 66 Cal. 658.

<sup>6</sup> *Chicot Co. v. Kruse*, 47 Ark. 80; *Clay Co. v. McAleer*, 115 U. S. 616; *Supervisors v. United States*, 18 Wall. 71.

<sup>7</sup> *Clapper, Ex parte*, 3 Hill, 458;

*People v. Crotty*, 93 Ill. 180; *Q. v. Ambergate, etc.* R. R., 1 El. & Bl. 372; *Ross v. Lane*, 3 Sm. & M. 695; *Menard v. Shaw*, 5 Tex. 334; *People v. Fowler*, 55 N. Y. 252; *Gillespie v. Wood*, 4 Humph. 437; *Puckett v. White*, 22 Tex. 559.

<sup>8</sup> *People v. Hyde Park*, 117 Ill. 462.

<sup>9</sup> *Draper v. Noteware*, 7 Cal. 276; *Q. v. Arnaud*, 16 L. J. (N. S.) 50, Q. B.; *Q. v. Radnorshire (J.)*, 15 L. J. (N. S.) 151, M. C.; 3 *Stephen's Nisi Prius*, 2291.

though at the time of the application for a license it was his duty to issue it, if by a change in the law prior to the issuance of a *mandamus* it has become a criminal offense to sell liquors.<sup>1</sup> Nor will a federal court compel state officers to levy a tax, when they are not authorized by state law to do so,<sup>2</sup> nor when they have already exhausted the power given them in that respect.<sup>3</sup> Commissioners of highways will not be compelled to open a highway which their predecessors laid out without authority, since they would be committing a trespass.<sup>4</sup> A county auditor was not compelled to place on his duplicate certain taxes levied by a city, because those taxes exceeded the rate allowed by law.<sup>5</sup> Tax assessors were required by law to attach a certain oath to their assessment rolls. They stated in their return to an alternative writ of *mandamus* that they could not truthfully make the oath required. The court refused to require them to do so, asserting that it would not force them to commit a crime.<sup>6</sup> A public body will not be required to violate a penal statute.<sup>7</sup> Nor will the writ be used to aid the enforcement of an illegal claim.<sup>8</sup>

§ 61. *Mandamus* is entirely a civil remedy.— Though this writ partakes somewhat of a criminal nature, yet it is held by all the courts to be a civil remedy having all the qualities and attributes of a civil action.<sup>9</sup> In applying their practice acts to this writ some of the courts designate it as a civil action or an ordinary action at law,<sup>10</sup> and other courts, exempting it from such acts, have considered it to be a special proceeding or proceeding of a special character, or

<sup>1</sup> Hall v. Steele, 82 Ala. 562.

<sup>7</sup> State v. Bergen (Freeholders), 52

<sup>2</sup> United States v. New Orleans, 2 Wood, C. C. 230; Clay Co. v. McAleer, 115 U. S. 616.

N. J. L. 313.

<sup>8</sup> Board Educa. v. Detroit (City), 80 Mich. 548.

<sup>3</sup> Supervisors v. United States, 18 Wall. 71.

<sup>9</sup> McBane v. People, 50 Ill. 503; Brower v. O'Brien, 2 Ind. 423; Judd v. Driver, 1 Kans. 455.

<sup>4</sup> Clapper, Ex parte, 3 Hill, 458.

<sup>5</sup> State v. Humphreys, 25 Ohio St. 520.

<sup>10</sup> Dement v. Rokker, 126 Ill. 174; Dove v. Ind. Sch. District, 41 Iowa, 689.

<sup>6</sup> People v. Fowler, 55 N. Y. 252.

a supplementary remedy.<sup>1</sup> It is applied solely to the protection of civil rights,<sup>2</sup> but this includes an interference in criminal proceedings, when necessary to protect such rights. It has been granted to make the justices hear a criminal case,<sup>3</sup> to compel the issuance of a summons in a criminal case,<sup>4</sup> to make an officer, before whom a person committed by a justice of the peace to await indictment was brought on *habeas corpus*, hear and pass on the evidence touching the prisoner's guilt,<sup>5</sup> and to make a judge enter judgment on the verdict of the jury and pass sentence accordingly,<sup>6</sup> to make a magistrate enforce a conviction,<sup>7</sup> and to compel a court to proceed and try a criminal case, wherein it has erroneously decided that it has no jurisdiction and has refused to proceed,<sup>8</sup> or that it has no authority to proceed further in the cause.<sup>9</sup> Unless protection is sought for property or against the infringement of personal rights, the writ will not issue. Political rights are not protected by the courts.<sup>10</sup>

<sup>1</sup>State v. Lewis, 76 Mo. 370; Gilman v. Bassett, 33 Conn. 298; Kentucky v. Dennison, 65 U. S. 66; Williamsport (City) v. Com., 90 Pa. St. 498; State v. Chicago, etc. R. R., 19 Neb. 476; Burnsville T. Co. v. State, 119 Ind. 382; Leigh v. State, 69 Ala. 261; Rosenbaum v. Sup'rs, 28 Fed. R. 223; Chumasero v. Potts, 2 Mont. 242.

<sup>2</sup>State v. Gracey, 11 Nev. 223.

<sup>3</sup>Q. v. Brown, 7 Ellis & B. 737;

Q. v. Mainwaring, Ellis, B. & E. 474; Reg. v. Bristol (J.), 28 Eng. L. & E. 160.

<sup>4</sup>Q. v. Adamson, 1 Q. B. D. 201.

<sup>5</sup>Mahone, Ex parte, 30 Ala. 49.

<sup>6</sup>State v. Snyder, 98 Mo. 555.

<sup>7</sup>King v. Robinson, 2 Smith, 274.

<sup>8</sup>State v. Laughlin, 75 Mo. 358; Q. v. Brown, 7 Ellis & B. 757.

<sup>9</sup>Turner, In re, 5 Ohio, 542.

<sup>10</sup>Georgia v. Stanton, 6 Wall. 50.

## CHAPTER 6.

### DISCRETION OF COURT IN ISSUING THE WRIT.

- § 62. Nature of the discretion of the court.
- 63. Illustrations of exercise of discretion.
- 64. Limitations as to the use of the writ from its nature.
- 65. Subject continued.
- 66. The court will try to make the writ the means of obtaining substantial justice.
- 67. The writ will be granted only in cases of necessity.
- 68. Relator must show good motives and correct actions.
- 69. *Mandamus* will be refused to direct an officer's general course of conduct.
- 70. Writ refused when delay in acting not unreasonable.
- 71. Writ will be refused when it will work injustice.
- 72. Writ will be refused when justice will not be subserved thereby.
- 73. Writ will be refused when it will operate harshly.
- 74. The writ will not be issued unless it can effect substantial justice.
- 75. The writ will not issue when it will be unavailing.
- 76. Subject continued.
- 77. If the relator's rights expire before the hearing, the writ will be refused.
- 78. Writ will be denied if respondent has gone out of office or the act ceases to be his duty.
- 79. *Mandamus* to compel an action after the time limited for its performance.
- 80. Instances of issuing the writ after the time to perform the act had expired.
- 81. The court will protect the respondent's rights.
- 82. Parties will not be harassed by suits.
- 83. Discretion used in protecting the rights of third parties.
- 84. The writ will not issue when another tribunal can require the act to be done.
- 85. The last rule not strictly observed.
- 86. A *mandamus* not issued to command A. to command B.
- 87. Laches will bar relief by *mandamus*.
- 88. Discretion of court when the state is relator.

§ 62. **Nature of the discretion of the court.**—This writ was originally, and still remains in England, a prerogative writ, and was issued at the discretion of the court.<sup>1</sup> In America, at the present time, it is but seldom considered to be a prerogative writ.<sup>2</sup> Owing to the nature of our government or statutory provisions on the subject, it is generally considered as more of a writ of right,<sup>3</sup> to be issued in cases to which it applies,<sup>4</sup> and is considered to be an ordinary action at law,<sup>5</sup> and prosecuted in all respects as an ordinary action.<sup>6</sup> But, whether it be called a prerogative writ, a writ of right, or an ordinary action at law, the authorities agree that the courts have a discretion whether they will issue or refuse the writ,<sup>7</sup> even where a *prima facie* right thereto is shown.<sup>8</sup> Though there be no other remedy, the court will still exercise its discretion on the subject.<sup>9</sup> Such discretion must be a sound discretion,<sup>10</sup> guided by law. It must be governed by rule,<sup>11</sup> not by humor. It must not be arbitrary,<sup>12</sup> vague and fanciful, but legal and regular.<sup>13</sup> Where a party is entitled to a right, as to have a bill of ex-

<sup>1</sup> Leigh v. State, 69 Ala. 261; Bank of State v. Harrison, 66 Ga. 696; Rex v. Barker, 3 Burr. 1265; R. v. Clear, 4 B. & C. 901; Kendall v. United States, 12 Pet. 524.

<sup>2</sup> People v. Board Metrop. Police, 26 N. Y. 316.

<sup>3</sup> Chumasero v. Potts, 2 Mont. 242; State v. Com'rs Jefferson Co., 11 Kan. 66.

<sup>4</sup> Haymore v. Yadkin (Com'rs), 85 N. C. 268; Hartman v. Greenhow, 102 U. S. 672.

<sup>5</sup> People v. Weber, 86 Ill. 283; State v. Burnsville T. Co., 97 Ind. 416; State v. Lewis, 76 Mo. 370; State v. Lancaster, 13 Neb. 223; State v. Chicago, etc. R. R., 19 Neb. 476; Kentucky v. Denison, 65 U. S. 66; Gilman v. Bassett, 33 Conn. 298; Williamsport (City) v. Com., 90 Pa. St. 498.

<sup>6</sup> Dist. Twp. v. Ind. Dist., 72 Iowa. 687.

<sup>7</sup> People v. Weber, 86 Ill. 283; Daly v. Dimock, 55 Conn. 579; Evans v. Thomas, 32 Kan. 469; Belcher v. Treat, 61 Me. 577; State v. Buchanan, 24 W. Va. 362; Davis v. York Co. (Com'rs), 63 Me. 396; State v. Phillips Co. (Com'rs), 26 Kan. 419.

<sup>8</sup> Tennant v. Crocker, 85 Mich. 328.

<sup>9</sup> People v. Dowling, 55 Barb. 197.

<sup>10</sup> State v. Anderson Co. (Com'rs), 28 Kan. 67; Alger v. Seaver, 138 Mass. 331; King William Just. v. Munday, 2 Leigh, 165.

<sup>11</sup> People v. Chapin, 104 N. Y. 96.

<sup>12</sup> Fitch v. McDiarmid, 26 Ark. 482; Prop'rs St. Luke's Church v. Slack, 7 Cush. 226.

<sup>13</sup> Mackey, Ex parte, 15 S. C. 322.



ceptions signed, though it is said to be in the discretion of the court as to whether it shall be ordered, still, being a right, it cannot be considered as discretionary on the part of the court.<sup>1</sup> It has been said that it is perhaps impossible to lay down in advance a precise and inflexible rule to govern the discretion of the court.<sup>2</sup> Owing to the different theories held in England and America on the subject of this writ, the English courts, as should be expected, allow their discretion greater scope in issuing or refusing the writ than do the American courts, which are more inclined to consider its issue to be a matter of right, governed by well-established rules.

**§ 63. Illustrations of exercise of discretion.**—In exercising such discretion the court will consider all the circumstances, reviewing the whole case with due regard to the consequences of its action.<sup>3</sup> It will consider the exigency, the nature and extent of the wrong or injury, which will follow a refusal, etc.<sup>4</sup> The writ was refused: where its issuance would long continue confusion in the city, which a little good advice might soon put an end to;<sup>5</sup> to make county commissioners pay the damages awarded a party upon condemnation of his property, when they showed they had no money except what was required for the pressing necessities of the county;<sup>6</sup> to make a judge *ad hoc* try a cause, when the validity of his appointment was being contested on an appeal;<sup>7</sup> against the mayor of a city to appoint a chief of police, there being no other claimant to that office save the incumbent, against whom an information was pending to try his title thereto;<sup>8</sup> to make a city marshal station a police officer at a certain place, as ordered

<sup>1</sup> *Etheridge v. Hall*, 7 Port. 47.

<sup>4</sup> *Tennant v. Crocker*, 85 Mich. 328.

<sup>2</sup> *American, etc. Co. v. Haven*,  
101 Mass. 398.

<sup>5</sup> *Queen v. Heathcote*, 10 Mod. 48.

<sup>6</sup> *Com. v. Philadelphia (Com'rs)*,

<sup>3</sup> *Alger v. Seaver*, 138 Mass. 331; 1 Whart. 1.

*People v. Ketchum*, 72 Ill. 212; *People v. East Saginaw (Com. Council)*,

<sup>7</sup> *State v. Earhart*, 35 La. An. 603.

33 Mich. 164; *People v. Genesee (Mayor)*, 128 Mass. 312.

*Cir. Judge*, 37 Mich. 281.

by the board of aldermen;<sup>1</sup> when it called for a decision as to the number of officers to be elected, necessitating the determination of the constitutionality of a statute, when the petition was presented only five days before the election and was practically submitted without argument, whereas the matter required a full consideration with opportunity for all in interest to be heard.<sup>2</sup>

**§ 64. Limitations as to the use of the writ from its nature.**—This writ is described as “the right arm of the law.” Its principal office is not to inquire and investigate, but to command and execute. It is not designed to assume a part in ordinary lawsuits or equitable proceedings. It has been said that it is properly called into requisition in cases where the law has been settled, or in cases where questions of law or equity cannot properly and reasonably arise, and that its very nature implies that the law, although plain and clear, fails to be enforced, and needs assistance.<sup>3</sup> Other courts give it a much more extended scope. Where a trial by jury is allowed, it would seem proper to extend it to any case which falls within the general principles governing its application. It has been allowed where the taking of a long account was necessary,<sup>4</sup> yet it has been held, that the question, whether certain land is a public highway or not, will not be determined in a *mandamus* proceeding.<sup>5</sup> So it has been considered that, when the title to real estate is directly in issue, a *mandamus* is not proper to determine the question; yet, when such question is only incidentally involved, and may affect the discretion of the court in awarding or denying the writ, it is proper that the court should be satisfied on the subject.<sup>6</sup> The federal courts confine the writ within a very narrow scope,<sup>7</sup> but other courts

<sup>1</sup> Alger v. Seaver, 138 Mass. 331.

<sup>5</sup> Tennant v. Crocker, 85 Mich.

<sup>2</sup> State v. Com'rs of Douglas Co., 328.  
18 Neb. 506.

<sup>6</sup> Eby v. School Trustees, 87 Cal.

<sup>3</sup> Townes v. Nichols, 73 Me. 515.

166.

<sup>4</sup> Haines v. Saginaw Co., 87 Mich.,

<sup>7</sup> See § 31.

seldom place any restrictions when the case falls within the general principles governing the issuance of the writ.

§ 65. **Subject continued.**—Some courts in such proceedings refuse to pass on the constitutionality of a law on the ground that the rights of third parties, who cannot be heard in such proceedings, are involved, or that the question should be adjudicated in a more solemn manner, upon a full hearing, when properly presented by parties in an action.<sup>1</sup> The reasons given do not seem to justify such refusal. The questions of law can be as thoroughly presented and argued in such a proceeding as in any other legal proceeding. The decision reached in a lawsuit often decides the rights of other parties, who are similarly situated but are not before the court. Accordingly we find many cases where in *mandamus* proceedings the courts have not hesitated to pass on the constitutionality of a law, in some cases sustaining and in other cases overthrowing the law.<sup>2</sup> But the courts will not consider the constitutionality of a law in a *mandamus* proceeding at the instance of a ministerial officer. If he should be allowed to question the law of the land, the operations of the government would

<sup>1</sup> *People v. Stevens*, 2 Abb. Pr. (N. S.) 348; *Smyth v. Titcomb*, 31 Me. 272; *Davis v. Superior Court*, 63 Cal. 581; *Maxwell v. Burton*, 2 Utah, 595; *State v. Hagood*, 30 S. C. 519.

<sup>2</sup> *State v. Steen*, 43 N. J. L. 542; *Humboldt Co. v. Churchill Co.* (Com'rs), 6 Nev. 30; *Fowler v. Pierce*, 2 Cal. 165; *McCauley v. Brooks*, 16 Cal. 11; *State v. Barker*, 4 Kans. 379; *State v. Meadows*, 1 Kans. 90; *State v. McKinney*, 5 Nev. 194; *State v. Lean*, 9 Wis. 279; *State v. Whitworth*, 8 Lea, 594; *State v. Tappan*, 29 Wis. 664; *McConihe v. State*, 17 Fla. 238; *State v. Mitchell*, 31 Ohio St. 592; *Swan v. Buck*, 40 Miss. 268; *State v. Bordelon*, 6 La. An. 68; *State v. Jumel*, 31 La. An. 142; *Tennessee, etc. R. R. v. Moore*, 36 Ala. 371; *Galveston, etc. R. R. v. Gross*, 47 Tex. 428; *Public School (Com'rs) v. Allegany Co. (Com'rs)*, 20 Md. 449; *State v. Stout*, 61 Ind. 143; *State v. Compt. Gen.*, 4 Rich. (N. S.) 185; *Morton v. Compt. Gen.*, 4 Rich. (N. S.) 430; *Ex parte Lynch*, 16 S. C. 32; *People v. Judge 12th Dist.*, 17 Cal. 547; *State v. Fairfield Co. (Com. Pleas Court)*, 15 Ohio St. 377; *Russell v. Elliott*, 2 Cal. 245; *State v. Harris*, 17 Ohio St. 608; *Madison, Co. v. People*, 58 Ill. 456; *Cincinnati, etc. R. R. v. Com'rs Clinton Co.*, 1 Ohio St. 77; *People v. Batchellor*, 53 N. Y. 128; *State v. Perry Co. (Com'rs)*, 5 Ohio St. 497; *State v. Baltimore Co. (Com'rs)*, 29 Md. 516.

be thwarted and great confusion would result. If the law is void, the parties affected thereby can appeal to the courts for their protection.<sup>1</sup> A *mandamus* will not be issued to compel the granting of a license under a law for a reason which, if valid, shows the law itself to be unconstitutional.<sup>2</sup>

§ 66. **The court will try to make the writ the means of procuring substantial justice.**—As the guardian of public rights and in the exercise of its authority to issue this writ, the court will render it, so far as it can, the means of substantial justice, in every case, where there is no other specific legal remedy for a legal right.<sup>3</sup> It is no objection to the issuance of this writ, that it will produce a circuitry of action, if the party has a right to the writ. Where a party obtained a judgment for damages against a town and another, he was allowed this writ to compel the town to levy a tax to pay his claim, though the other defendant had property subject to levy.<sup>4</sup> In these writs the courts pass on real contests, enforce or protect specific rights, and redress actual wrongs.<sup>5</sup> The writ will be denied if the applicant fails to show any interest in the action prayed for.<sup>6</sup> A mere creditor of the state cannot obtain a *mandamus*, and thereby assume to exercise a supervisory control over the treasurer and auditor of the state as to how they conduct their offices. They owe a duty to the state and not to him, and he cannot supervise their settlements with the various tax collectors.<sup>7</sup> There must be a duty, and a direct right or interest to be enforced. So, if there is not a serious contest, the writ will be refused.<sup>8</sup> The same rule is applied

<sup>1</sup> *Smyth v. Titcomb*, 31 Me. 272; *State v. Buchanan*, 24 W. Va. 362; *People v. Salomon*, 54 Ill. 39; *Bassett v. Barbin*, 11 La. An. 672. On the other hand, an officer whose duty it was to levy a tax was held to be authorized to refuse to make the levy because he correctly considered the law which prescribed the tax to be void. *State v. Tappan*, 29 Wis. 664.

<sup>2</sup> *People v. San Francisco (Sup'rs)*, 20 Cal. 591.

<sup>3</sup> *People v. Green Co. (Sup'rs)*, 12 Barb. 217.

<sup>4</sup> *Palmer v. Stacy*, 44 Iowa, 340.

<sup>5</sup> *Mossy v. Harris*, 25 La. An. 623.

<sup>6</sup> *State v. School Fund*, 4 Kans. 261.

<sup>7</sup> *State v. Dubuclet*, 28 La. An. 85.

<sup>8</sup> *Mossy v. Harris*, 25 La. An. 623.

when the right sought is, or has become, a mere abstract right, the enforcement of which, by change of circumstances since the commencement of the suit, can be of no substantial or practical benefit to the petitioner.<sup>1</sup> The writ is only issued when it is necessary to secure the ends of justice or some good and useful object.<sup>2</sup> It will not require, that the public good be sacrificed for the advantage of one or more citizens.<sup>3</sup> Where a party sought to compel a superintendent of schools to contract with him to supply the school books to be used in the county schools, in accordance with the law, his books having been adopted by the proper authorities for use in those schools, the court refused to grant the writ, because other books had been adopted subsequently, though illegally, for such use, which had been purchased by the patrons of the schools and were already in use, and the teachers were required to use them. The court decided that public interests were first to be considered, and, in view of the complications and evil consequences likely to arise, it was not considered proper to grant the writ.<sup>4</sup> A *mandamus* will not be granted, to compel a municipal corporation to pay a claim against it, when all the funds it possesses are required for its ordinary and necessary expenses, nor to compel it to levy a tax in order to pay such claim from the proceeds thereof, when all the money that can be so raised is absolutely required for such expenses.<sup>5</sup> When the lowest bidder for a contract asked for a *mandamus* to compel its award to him, and the return stated that after the opening of the bids the public authorities had materially altered the design of the work, and that the public interests required that new bids should be advertised for, the court in its discretion refused to issue the writ.<sup>6</sup> Substantial interests<sup>7</sup> or substantial rights<sup>8</sup> must be involved. The writ

<sup>1</sup> Gormley v. Day, 114 Ill. 185.

<sup>5</sup> See § 132.

<sup>2</sup> George & Co. v. Co. Com'rs, 59 Md. 255; Booze v. Humbird, 27 Md. 1.

<sup>6</sup> People v. Croton Aqueduct Board, 49 Barb. 259.

<sup>3</sup> State v. Graves, 19 Md. 351.

<sup>7</sup> State v. Burbank, 22 La. An. 298; Hall v. Crossman, 27 Vt. 297.

<sup>4</sup> Effingham v. Hamilton (Miss., April term, 1891), 10 South. R. 39.

<sup>8</sup> State v. Flad, 26 Mo. Ap. 500.

was refused when only two dollars were involved.<sup>1</sup> It will be refused if the effect of it will be merely to encourage petty legislation and to delay other more important interests.<sup>2</sup> The writ will not issue when the sole purpose and effect of it is to relieve the party asking for it from the consequences of his own mistakes or omissions. Where a clerk issued to a purchaser at a tax sale such a tax deed as he requested, a *mandamus* to make him issue a different deed was refused. Had the clerk made the mistake, the writ might have issued to make him correct it.<sup>3</sup> It is not considered advisable to issue this writ unless substantial, if not final, relief can be given.<sup>4</sup> It has been said, that it must be made to appear that the writ will be effectual, and that the court has jurisdiction to enforce compliance with its commands.<sup>5</sup> Where the end could not be accomplished, the court refused to set any of the machinery in motion. Where there was no appropriation to pay a claim, the court refused to compel the attorney-general to give a certificate concerning it to the comptroller, or the comptroller to issue a warrant.<sup>6</sup> Where it appeared that the object sought could have been secured without serious difficulty without the assistance of the court, the writ was refused.<sup>7</sup>

**§ 67. The writ will be granted only in case of necessity.**—This writ was designed only to meet emergencies and to prevent a failure of justice. The courts intend, that it shall be reserved for extraordinary occasions and require litigants to use all available means to obtain the enforcement of their rights before they apply to the court for the assistance of this writ. Where the trustees of a private corporation refused to sign and publish a certain notice concerning the legality of which there was some doubt, the court refused to allow a writ of *mandamus* to compel them

<sup>1</sup> *People v. Hatch*, 33 Ill. 134.

<sup>2</sup> *People v. Hatch*, 33 Ill. 134.

<sup>3</sup> *Klokke v. Stanley*, 109 Ill. 192.

<sup>4</sup> *Sherburne v. Horn*, 45 Mich.

160.

<sup>5</sup> *People v. Colorado C. R. R.*, 42

Fed. Rep. 638.

<sup>6</sup> *People v. Tremain*, 29 Barb. 96.

<sup>7</sup> *Harrison v. Simonds*, 44 Conn.

318.

to do so, since it was apparent that the object sought — the publication of a proper notice — could have been secured without serious difficulty without the aid of the court.<sup>1</sup> The writ will be refused when the respondents admit on the record that they are willing to do the act desired;<sup>2</sup> but such willingness on the part of the respondent to do the act desired will not suffice to obtain the writ, when there is any substantial defect in the proof of the relator's right, for that must always be clear.<sup>3</sup> If the act sought has already been done,<sup>4</sup> or is voluntarily done after the hearing on the application,<sup>5</sup> the proceedings will be dismissed.

§ 68. **Relator must show good motives and correct actions.**—Since this writ is only issued in furtherance of justice, those who seek its assistance must satisfy the court that their application is *bona fide* and for a proper purpose.<sup>6</sup> It will be refused when the action is collusive and fictitious,<sup>7</sup> when the cause is brought to obtain the opinion of the court on a point of law,<sup>8</sup> to determine a fanciful question,<sup>9</sup> for curiosity<sup>10</sup> or a mere matter of taste,<sup>11</sup> to gratify the spite of a private individual,<sup>12</sup> or when the relator has investigated, authorized or approved of the act complained of.<sup>13</sup> When a corporator wished to see the list of stockholders of the corporation to confer with them as to suing to set aside a lease made by the company, the court stated that the writ would not issue at the caprice of the suspicious or curious.<sup>14</sup> An application for a *mandamus*, to compel the issue of \$50,000 worth of stock and the sale of it to a

<sup>1</sup> Harrison v. Simonds, 44 Conn. 318.

<sup>2</sup> People v. Dulaney, 96 Ill. 503.

<sup>3</sup> Bracken v. Wells, 3 Tex. 88.

<sup>4</sup> Johnson v. Ward, 82 Ala. 486; Electric R. R. v. Grand Rapids (City), 84 Mich. 257.

<sup>5</sup> State v. Railroad, 31 S. C. 609.

<sup>6</sup> R. v. Liverpool R. R., 21 L. J. Q. B. 284.

<sup>7</sup> State v. Burbank, 22 La. An. 298.

<sup>8</sup> Q. v. Blackwell R. R., 9 D. P. C. 558.

<sup>9</sup> People v. Masonic B. Assoc., 98 Ill. 635.

<sup>10</sup> R. v. Staffordshire, 6 A. & E. 101.

<sup>11</sup> State v. St. Louis P. M. Co., 21 Mo. Ap. 526.

<sup>12</sup> Hale v. Risley, 69 Mich. 596.

<sup>13</sup> Hale v. Risley, *supra*.

<sup>14</sup> Com. v. Empire P. R. R., 134 Pa. St. 237.

company for \$1, was refused because it looked like fraud.<sup>1</sup> A *mandamus* was refused to compel the signing of a bill of exceptions, where the prisoner had escaped after conviction. The courts will not encourage escapes, and facilitate the evasion of the justice of the state, by extending to escaped convicts the means of reviewing their convictions.<sup>2</sup> Where a *mandamus* was asked to compel a clerk, who had turned over his office to another person, to issue an execution on a judgment, the court stated that in its discretion it was proper to dismiss the proceedings, since they were really brought in order to contest a statute which consolidated two cities.<sup>3</sup> The writ will be refused when the proceedings have been tainted with fraud and corruption<sup>4</sup> or with illegality.<sup>5</sup> Where, under the law, it was the duty of a municipal corporation to pass a by-law granting a bonus to a railroad company in accordance with the vote of the electors of such municipality, a *mandamus* to compel such action was refused, because it appeared that bribery had been used in the election to control the result in favor of granting the bonus.<sup>6</sup>

**§ 69. Mandamus will be refused to direct an officer's general course of conduct.**—By reason of the difficulty attending the effort, and the fact that in such cases there is generally some discretion allowed as to the mode of acting, the courts will not grant a *mandamus* to direct the general course of conduct of an officer. There are also generally other modes of compelling an officer to do his duty. Often the courts are not well qualified to take the functions of an officer out of his hands and to take upon themselves the direction thereof. Such action would make the writ of *mandamus* an ordinary proceeding instead of an extraordinary, which it is intended to be. For such reasons the police officials, when they disregard or violate their

<sup>1</sup> Madison Co. v. People, 58 Ill. 456.

<sup>2</sup> People v. Genet, 59 N. Y. 80.

<sup>3</sup> Pistorius v. Stempel, 81 Mich.

<sup>4</sup> Com. v. Henry, 49 Pa. St. 530.

<sup>5</sup> State v. Timken, 48 N. J. L. 87.

<sup>6</sup> Langdon, etc. R. R., In re, 45



duties, may be required to do a certain act or vacate an improper order, but will not be controlled as to their general course of conduct. Though they may be ordered to perform a public duty incumbent on them, yet they will not be directed as to the manner of such performance.<sup>1</sup> Aldermen will not be compelled by this writ to attend the meetings of a common council and to perform their general official duties, which would require a general supervision of the affairs of the city.<sup>2</sup>

**§ 70. Writ refused when delay in acting not unreasonable.**—The courts in their discretion will refuse the writ of *mandamus* when there has been no unreasonable delay by the officer in performing the duty whose execution is sought, but, if there has been such delay, the writ will issue to compel action. The writ has been issued to compel the county commissioners to act with reasonable promptness in passing on the sufficiency of the sureties on the bond of the county recorder elect,<sup>3</sup> and to make a new county proceed to act in determining how much of the debt of an old county, of which it was formerly a part, it was bound to assume.<sup>4</sup> It is too late to apply for the writ when the officers have set themselves in motion and are proceeding to discharge their duties.<sup>5</sup> A *mandamus* was refused to compel the regents of a university to select a professor, because they were investigating the qualifications of various professors, and had not unreasonably delayed their decision.<sup>6</sup>

**§ 71. Writ will be refused when it will work injustice.**—The court, acting under its discretion, and endeavoring only to enforce justice, will not allow this writ to be used as an instrument to work injustice,<sup>7</sup> nor to introduce

<sup>1</sup> State v. Francis, 95 Mo. 44; State v. Murphy, 3 Ohio C. C. 332; State v. Columbus (Police Board), 19 Weekly L. Bul. 347.

<sup>2</sup> People v. Whipple, 41 Mich. 548. See § 113.

<sup>3</sup> State v. Belmont Co. (Com'rs), 31 Ohio St. 451.

<sup>4</sup> Lee Co. v. State, 36 Ark. 276; Monroe Co. v. Lee Co., 36 Ark. 378.

<sup>5</sup> School Directors v. Anderson, 45 Pa. St. 388; State v. Davenport (City), 12 Iowa, 335.

<sup>6</sup> People v. University (Regents), 4 Mich. 98.

<sup>7</sup> State v. Burbank, 22 La. An. 298.

confusion and disorder.<sup>1</sup> The law required the state treasurer to issue certain scrip, receivable in payment of taxes and state dues, and required an annual tax to be levied to pay the same. Injunctions had been issued restraining state and county treasurers from receiving such scrip on the ground that it was void. A *mandamus* against the comptroller-general to levy the tax required was refused, because it would introduce confusion or disorder.<sup>2</sup> A technical compliance with the law, contrary to its spirit, will not be compelled by this writ.<sup>3</sup>

§ 72. Writ will be refused when justice will not be subserved thereby.—Proceeding on the principle that the court will, under this writ, so far as it can, furnish the means of substantial justice, the court will refuse to issue it when justice will not be subserved thereby. When an appeal from a judgment against a county was taken to a higher court, but such appeal did not act as a *supersedeas*, a *mandamus* to compel the county to levy a tax to pay such judgment was refused, because the collection of the judgment was not endangered by delay, and such levy of a tax might work an injustice in case the judgment was reversed, it being admitted that the appeal was taken in good faith.<sup>4</sup> Where a railroad corporation, which had lain dormant for many years, without entering upon any undertaking, applied for a *mandamus* against a board of public works to compel such board to allow it to enter upon the public streets to construct its road, and it appeared that the state had brought an action against such corporation to dissolve it, and had applied for an injunction to restrain the prosecution of the *mandamus* proceeding, which application the court refused on a stipulation by the corporation that it would not use the permit, if obtained, to enter upon the public streets till the action to dissolve it

<sup>1</sup> State v. Compt.-Gen., 4 Rich. (N. S.) 185.

<sup>2</sup> State v. Compt.-Gen., 4 Rich. (N. S.) 185.

<sup>3</sup> State v. Phillips Co. (Com'rs), 26 Kans. 419.

<sup>4</sup> Ter. v. Woodbury (N. Dak., April 1, 1890), 44 N. W. Rep. 1077.

was defeated, the court in the exercise of its discretion refused to issue the *mandamus*.<sup>1</sup> Where a *mandamus* was sought in order to set aside suits brought against the relator, who claimed that such suits were brought against him merely to delay him in a prior suit wherein he was plaintiff, the court held that it could not assume, on the relator's assertion, that that was the object of such suits, and that it could not try such issues, and refused the writ.<sup>2</sup>

§ 73. **Writ will be refused when it will operate harshly.**—By virtue of its discretionary power a court will refuse this writ when it will operate harshly. Where a freeholder was using a road principally to assist him in erecting his buildings, whose use hurt it materially, a *mandamus* to appoint a surveyor to examine it, and upon his report to compel the vestry to repair it, was refused at that time, because it would operate harshly on the public and would be for the benefit of that freeholder principally.<sup>3</sup> Where a *mandamus* was applied for to compel a sheriff to make a deed to a purchaser at an execution sale, the court claimed a right to refuse the writ when obedience thereto would be attended with manifest hardships and difficulties to others. In that case the court issued the writ, but without prejudice to certain rights.<sup>4</sup> If under the circumstances the court thinks that in justice more time should be allowed before the writ is granted, it will refuse the application. A *mandamus* was applied for to compel a railroad company to summon a jury to assess the damages sustained in the construction of its line, including the value of the land appropriated and the injury to other land belonging to the relator. Since the company was still working faithfully and the effects of its operations could not yet be ascertained, the court refused the writ at that time.<sup>5</sup> A *mandamus* to proceed to the election of a mayor was re-

<sup>1</sup> *People v. Newton*, 126 N. Y. 656.

<sup>4</sup> *Van Rensselaer v. Sheriff*, 1 Cow.

<sup>2</sup> *Burt v. Reilly*, 82 Mich. 251.

501.

<sup>3</sup> *King v. Paddington Vestry*, 9 B. & C. 456.

<sup>5</sup> *Parkes, Ex parte*, 9 Dowl. 614.

fused, because the judgment of ouster against the incumbent had not yet been signed.<sup>1</sup>

§ 74. **The writ will not be issued unless it can effect substantial justice.**—The object of the writ is to afford substantial justice; consequently the court, in its discretion, will not issue the writ where the respondents have the power by subsequent action to nullify its effect. An officer will not be restored to his office by this writ when he has been irregularly suspended or removed therefrom, if there are good grounds for such suspension or removal, and the respondents may immediately suspend or remove him regularly for the same causes.<sup>2</sup> The writ will not be granted to restore a person to an office which is held at the pleasure of others,<sup>3</sup> or from which he can be removed by a majority vote,<sup>4</sup> nor to a place which is a mere service.<sup>5</sup>

§ 75. **The writ will not issue when it will be unavailing.**—Since courts of justice sit solely to enforce the rights of which parties have been deprived, they will not consider questions when they are powerless to grant the relief asked. They will not issue the writ of *mandamus* when it is clear that it will prove unavailing.<sup>6</sup> A *mandamus* to an assessor to assess certain property was refused because at that time he had ceased to have any further control over the assessments under the law.<sup>7</sup> If the writ will be of no benefit to the applicant it will be refused.<sup>8</sup> Where a tax deed would have been based on an assessment, which was irregular and would convey no title, a *mandamus* to make the tax col-

<sup>1</sup> *Rex v. West Loe (Corp.)*, Burr. 1386.

<sup>2</sup> *King v. London (Mayor)*, 2 Term R. 177; *King v. Bristol (Mayor)*, 1 Dow. & Ry. 389; *Rex v. Axbridge (Mayor)*, Cowp. 523; *R. v. Griffiths*, 5 B. & Ald. 731; *People v. Police Board*, 35 Barb. 527.

<sup>3</sup> *R. v. Coventry*, 2 Salk. 430; *Sandys, Ex parte*, 4 B. & Ad. 863.

<sup>4</sup> *Evans v. Heart of Oak B. Soc.*, 12 Jur. (N. S.) 163.

<sup>5</sup> *Q. v. Raines*, 3 Salk. 233.

<sup>6</sup> *State v. New Orleans*, 34 La. An. 469; *Mitchell v. Boardman*, 79 Me. 469; *State v. Secrest*, 33 Minn. 381; *Maddox v. Neal*, 45 Ark. 121; *Clark v. Crane*, 57 Cal. 629; *Tennant v. Crocker*, 85 Mich. 328; *Public Schools (Com'rs) v. County Com'rs*, 20 Md. 449.

<sup>7</sup> *State v. Archibald*, 43 Minn. 328.

<sup>8</sup> *Hall v. Crossman*, 27 Vt. 297; *Klokke v. Stanley*, 109 Ill. 192; *Tay-*

lector execute a deed to the purchaser was refused.<sup>1</sup> The writ will be refused when the act sought is physically impossible,<sup>2</sup> or from extrinsic circumstances has become so.<sup>3</sup> The assessors cannot be compelled to correct the assessment rolls after they have delivered them to the supervisors, who have issued warrants to the collector to collect the taxes.<sup>4</sup> A sheriff cannot be compelled to produce the body of a prisoner, whom he has surrendered to the county commissioners, though he did so after the writ was served on him. Though the officer has himself put it out of his power to do the duty demanded of him, yet the writ of *mandamus* will not be issued to compel him to do the act, but he may be liable in damages to the person prejudiced by his act.<sup>5</sup> The writ was refused where it was sought to compel the officers in charge of a certain fund to allot money to a certain religious corporation, they having already divided up and delivered the whole of the fund to other similar bodies.<sup>6</sup> A writ to the supervisors to strike relator's name from the assessment roll was refused because the assessors no longer had control over it, and any action on their part would not stay the receiver of taxes in executing the warrant therefor.<sup>7</sup> A town was authorized to subscribe to the capital stock of a navigation company, and to pay therefor by a sale of its bonds on certain terms. To a *mandamus* to compel the payment of the subscription the town returned that it had tried in vain to sell the bonds on the

lor v. McPheters, 111 Mass. 351; Q. v. Northwich Sav. Bank, 9 A. & E. 729; State v. Berry, 14 Ohio St. 315.

<sup>1</sup> Bosworth v. Webster, 64 Cal. 1.

<sup>2</sup> O. & M. R. R. v. People, 120 Ill. 200; Silverthorne v. Warren R. R., 33 N. J. L. 173; People v. Hayt, 66 N. Y. 606; Ball v. Lappius, 3 Oreg. 55; State v. Election Inspectors, 17 Fla. 26.

<sup>3</sup> Ackerman v. Desho Co., 27 Ark.

457; State v. Lehre, 7 Rich. 234; O. & M. R. R. v. People, 120 Ill. 200.

<sup>4</sup> People v. Westchester (Sup'rs), 15 Barb. 607; Sullivan v. Peckham, 16 R. I. 525.

<sup>5</sup> Rice v. Walker, 44 Iowa, 458; Shandies, Ex parte, 66 Ala. 134.

<sup>6</sup> Spiritual A. Soc. v. Randolph (Selectmen), 58 Vt. 192; State v. Warren Co. (Trustees), 1 Ohio, 300.

<sup>7</sup> Colonial, etc. Co. v. Board Sup'rs, 24 Barb. 166.

prescribed terms, and the writ was dismissed.<sup>1</sup> Before a county clerk could extend a tax against the township property to raise a sufficient sum to pay a township donation to a railroad, the law provided that the result of the vote must have been certified to him by the town trustees. For lack of such certification, though the town had no trustees, the clerk was not required to extend the tax.<sup>2</sup> A clerk of a village will not be required to post copies of an ordinance of the village council, when such ordinance has been repealed prior to the application for the *mandamus*.<sup>3</sup>

§ 76. **Subject continued.**—The court, however, will exercise its discretion in such matters, and if at a later period the act desired will become possible, the court may extend the time for making a return to the writ. When a public body returns that it has not the funds necessary for the work commanded by the alternative writ, the court will not quash the return, but will extend the time for making a return to cover a period within which the act commanded can be done.<sup>4</sup> As a general rule, however, the writ will be refused when the respondent cannot obey it. A company was not required to finish its railroad line, when it returned that it was obliged to rely for the necessary money on subscriptions to its stock, and that it could not obtain any subscriptions.<sup>5</sup> To an application to compel a railroad to make a bridge for a turnpike company over its track, it returned that it had no power to borrow money, its share capital was spent, and its borrowing powers exhausted. The writ was refused.<sup>6</sup> Where, however, a corporation has by its own act incapacitated itself from doing the act, or has voluntarily placed itself in a position requiring resources beyond its means to discharge its obligations, the writ may be

<sup>1</sup>Neuse N. Co. v. Newbern (Com'rs), 7 Jones, 275.

<sup>2</sup>Springfield, etc. R. R. v. Wayne Co. (Clerk), 74 Ill. 27.

<sup>3</sup>Gormley v. Day, 114 Ill. 185.

<sup>4</sup>State v. Bergen (Freeholders), 52 N. J. L. 313.

<sup>5</sup>Q. v. Ambergate, etc. R. R., 1 El. & Bl. 372.

<sup>6</sup>Bristol, etc. R. R., In re, 3 Q. B. D. 10.

issued.<sup>1</sup> If, however, in the latter case the company should show that it had acted in good faith, and its disability arose from unforeseen circumstances, it was said that the court might refuse the writ.<sup>2</sup> It would seem that the only object in issuing the writ in such case would be to bring a pressure to make the company exert itself to comply with the order, and possibly to punish for wrong-doing, since, in case of non-compliance with the order, the answer that the act was impossible would be sufficient in proceedings for contempt; for it is not true in all cases that the court will not order by *mandamus* the performance of a certain duty because the respondent has not within himself the power to do the thing. Where an order was asked that a railroad company be required to restore a highway which it had injured in constructing its line, and the company returned that to do so it would be necessary for it to condemn land by legal proceedings, the court held that the writ could issue, and, if the company could not succeed in condemning land and was defeated in its efforts to do so, that would be a good answer to proceedings for contempt.<sup>3</sup> Probably for the same reasons a *mandamus* was issued to a town collector to pay the tax collections to the proper officer, though he had already paid them to the wrong officer and thereby made his duty difficult or inconvenient;<sup>4</sup> and to a county treasurer to pay coupons on county bonds, who had received sufficient funds therefor but had allowed the county court, after demand made on him to pay the coupons, to take the funds from his control and place them in New York, in order that these coupons might be paid there.<sup>5</sup> When a corporation is unable to discharge its duties, it has been asserted that *quo warranto*, and not *mandamus*, should be resorted to.<sup>6</sup>

<sup>1</sup> *Q. v. Birmingham, etc. R. R.*, 2 Ad. & E. (N. S.) 47; *Silverthorn v. Warren R. R.*, 33 N. J. L. 173.

<sup>2</sup> *Q. v. York, etc. R. R.*, 1 E. & B. 178.

<sup>3</sup> *People v. Dutchess, etc. R. R.*, 58 N. Y. 152.

<sup>4</sup> *People v. Brown*, 55 N. Y. 180.

<sup>5</sup> *State v. Craig*, 69 Mo. 565.

<sup>6</sup> *O. & M. R. R. v. People*, 120 Ill. 200.

§ 77. If the relator's rights expire before the hearing, the writ will be refused.— When the term of office which the relator is seeking, or his right to have an act done, has expired before the writ is heard, the *mandamus* will be refused.<sup>1</sup> A party was entitled to the issuance of a license, but, before the writ was heard, such right ceased by a change of the city ordinance, and his application was refused.<sup>2</sup> A *mandamus* to a city council to elect certain officers was refused, because the term for which they were to be elected had expired before the hearing.<sup>3</sup> A board of canvassers will not be required to re-assemble, canvass the votes, and declare the result, when the term has expired for which the party was elected.<sup>4</sup> A common council cannot be required to select papers for public advertising for a certain year after that year has expired.<sup>5</sup> A *mandamus* to keep a public school open for three months during a certain summer was refused, because that period of time had passed when the cause came on to be heard.<sup>6</sup> So, in its discretion, the court will refuse the writ, if the term of office which the relator seeks will expire before the action will be finished.<sup>7</sup> A board of canvassers will not be required to convene and declare the result when they have ceased to exist.<sup>8</sup> Church-wardens cannot be compelled to make tax rates after their authority in the premises has expired.<sup>9</sup>

§ 78. Writ will be denied if the respondent has gone out of office, or the act ceases to be his duty.— This writ will be denied when, for any cause, it becomes legally impossible, or rather ceases to be a legal duty.<sup>10</sup> When the

<sup>1</sup> Colvard v. Commissioners, 95 N. C. 515.

<sup>2</sup> Cutcomp v. Mayor, 60 Iowa, 156.

<sup>3</sup> People v. Troy (City), 82 N. Y. 575.

<sup>4</sup> Potts v. Tuttle, 79 Iowa, 253.

<sup>5</sup> People v. Troy (Common Council), 78 N. Y. 33.

<sup>6</sup> Wood v. Farmer, 69 Iowa, 533.

<sup>7</sup> Woodbury v. County Commissioners, 40 Me. 304.

<sup>8</sup> Mackey, Ex parte, 15 S. C. 322; People v. Greene County (Sup'rs), 12 Barb. 212.

<sup>9</sup> Q. v. All Saints (Church-wardens), 1 Ap. Cas. 611.

<sup>10</sup> State v. Perrine, 34 N. J. L. 254; State v. Bowden, 18 Fla. 17.



law which created the duty is repealed, *mandamus* will not lie to enforce the duty. When the law which created a board for canvassing election returns has been repealed, no order can be issued to such board relative to such matters, not even to finish the work they have begun.<sup>1</sup> When the term of office of the party sought to be coerced has expired, the writ against him will be refused, since the legal ability to do the act exists no longer.<sup>2</sup> A clerk of a school district was not required to amend his minutes when he had ceased to be the clerk, and had moved out of the jurisdiction of the court.<sup>3</sup> Exceptions to this rule have been allowed. A judge was required to sign a bill of exceptions, though his term of office had expired, on the ground that otherwise the litigant would be remediless, and also that this was one of the duties the judge, in taking office, agreed to discharge.<sup>4</sup> So the writ is allowed if the late incumbent retains the books pertaining to his office,<sup>5</sup> or if he resigned his office in order to avoid the service of process.<sup>6</sup> In one case where the respondent's term of office had expired before the decision, the writ issued to give relator his costs, and to make clear his equity against the state.<sup>7</sup>

**§ 79. Mandamus to compel an action after the time limited for its performance.**—Whether a *mandamus* lies to compel the doing of an act after the time has passed in which by law it is required to be done, is a question of some difficulty. Since the writ only issues to compel the doing of an act which it is the duty of the officer to do without the writ,<sup>8</sup> how can it issue to compel him to do an act at a time when no law requires him to do it, and when

<sup>1</sup> State v. Gibbs, 13 Fla. 55.

<sup>3</sup> Mason v. School District, 20 Vt.

<sup>2</sup> State v. Kirman, 17 Nev. 380; 487.

Colvard v. Commissioners, 95 N. C. 515; Mackey, Ex parte, 15 S. C. 322; State v. Lynch, 8 Ohio St. 347; State v. Perrine, 34 N. J. L. 254; People v. Monroe Oyer & Terminer, 20 Wend. 108.

<sup>4</sup> State v. Barnes, 16 Neb. 37.

<sup>5</sup> State v. Kirman, 17 Nev. 380.

<sup>6</sup> State v. Guthrie, 17 Neb. 113.

<sup>7</sup> People v. Contract Board, 46 Barb. 254.

<sup>8</sup> See ch. 6, § —.

by inference the law forbids him to do it? When the law requires an officer to do an act on or before a certain time, and such limitation as to time is considered to be only directory, a writ of *mandamus* may issue to compel the doing of the act though such period has passed.<sup>1</sup> When the law has fixed a certain time wherein to do the act, with no limitation showing that it was the intention to forbid later action, the provision has been held to be directory, and the duty has been enforced at a later period by this writ.<sup>2</sup> Where it was evident that the law required the act, if done at all, to be done before a certain time, the writ has been refused. A levy court cannot be required to make a levy after the time limited by law for the making of the levy.<sup>3</sup> It has been held generally, that the writ will never issue to an officer to do an act, when by lapse of time he has lost all jurisdiction over the matter.<sup>4</sup> On the other hand the writ has often issued after the time for the performance of the act had passed, when the relator was not in fault, but the non-performance was due to the neglect, or refusal to act, of the officer.<sup>5</sup> In other cases all limitations in the law as to time of performance have been ignored, and the courts have considered that such provisions in the laws must be construed with reference to their power to superintend and control inferior jurisdictions and authorities of every kind. They have called attention to the great evils which might be perpetrated if officers could flagrantly ignore and violate their duties, with no power in the courts to redress the grievance. They also hold that the writ of *mandamus* was designed to be the proper remedy in such cases.

<sup>1</sup> King v. Norwich (Mayor), 1 B. Gen. v. Lawrence (City), 111 Mass. & Ad. 310; Rex v. Sparrow, 2 Stra. 90.  
1123.

<sup>2</sup> People v. Chenango (Sup'rs), 8 J. 359.

N. Y. 317; People v. Brooklyn  
(City Council), 77 N. Y. 503; Att'y

<sup>3</sup> Ellicott v. Levy Court, 1 Har. &

<sup>4</sup> Iron Companies v. Pace, 89 Tenn.  
707.

<sup>5</sup> See § 192.

§ 80. Instances of issuing writ after the time to perform the act had expired.—A writ of *mandamus* was sought to compel a mayor, elected in 1857, and the two assessors, who were in office in 1856, to hold a court to revise the list of burgesses of the city for the year 1856, which the law required to be done in 1856, not later than October 15. It was objected that the time for such action was limited to October 15, 1856, and that such action was not the duty of a mayor elected to office in 1857. The opinion of the court (several judges delivered dissenting opinions) says: "All statutes are to be read with reference to this known, acknowledged, recognized and established power of the court of queen's bench, as much as if express words were found in it directing what the court has ordered. We therefore attach no importance to the circumstance that the mayor came into office after the time when the municipal corporation directed the court to be holden. . . . That court has power by the prerogative writ of *mandamus* to amend all errors which tend to the oppression of the subject or other misgovernment, and it ought to be used when the law has provided no specific remedy, and justice and good government require that there ought to be one for the execution of the common law or the provisions of a statute." The writ was ordered to be issued.<sup>1</sup> Where a court failed during a certain term thereof to certify a case to an appellate court, as required by law, it was compelled to do so at a later period by order of the appellate court, which claimed the right so to do under its supervisory powers.<sup>2</sup> The writ has been issued to judges to sign bills of exceptions, when, owing to their own fault, they had failed to do so within the time limited by law.<sup>3</sup>

§ 81. The court will protect the respondent's rights. In passing upon the propriety of issuing this writ the courts are very careful to see, that the officer upon whom compulsion is to be exercised shall not suffer thereby, and to see

<sup>1</sup> Rochester (Mayor) v. Queen, L. J. 27 N. S., Q. B. 434.

<sup>2</sup> State v. Philips, 96 Mo. 570.

<sup>3</sup> See § 192.

that his rights are fully protected. The writ will be refused when the performance of the duty sought will involve the officer in litigation,<sup>1</sup> the result of which is in doubt,<sup>2</sup> or when litigation is required to settle the matter.<sup>3</sup> Such doubt must exist in the mind of the court; if the assertion thereof is a mere pretense, the court will not listen to it.<sup>4</sup> Where it will subject the officers to an action of trespass, the writ will not lie to commissioners of highways to open a road,<sup>5</sup> to make justices enforce by distress warrant a highway rate, if they are threatened with an action, and no indemnity has been offered by them,<sup>6</sup> or to justices to sue a high constable on his bond for neglect of duty, since there is no provision for reimbursing themselves for the costs which they might incur.<sup>7</sup> So where a party was required by statute to levy certain moneys from other parties, and to pay over a portion thereof to another person, though the writ was issued to take the necessary and legal measures to obtain payment, such order was considered not necessarily to mean to file suits, and the implication is contained in the opinion that the respondent would not be ordered to bring suits.<sup>8</sup> Since the plaintiff must always prove his case, if it remains doubtful whether the act sought will make the officer a trespasser, the writ will be refused.<sup>9</sup>

§ 82. **Parties will not be harassed by suits.**—In exercising its discretion in such matters the court adopts the equitable rule that it will prevent parties from being needlessly harassed by litigation. If the parties have already commenced proceedings in another case, even though in a differ-

<sup>1</sup> 3 Stephen's *Nisi Prius*, 2305; *King v. Halls*, 3 A. & E. 494; *King v. Greame*, 2 Ad. & E. 615.

<sup>2</sup> *State v. Perrine*, 34 N. J. L. 254; *King v. Dayrell*, 1 B. & C. 485.

<sup>3</sup> *Townes v. Nichols*, 73 Me. 515.

<sup>4</sup> *King v. Dayrell*, 1 B. & C. 485.

<sup>5</sup> *People v. Highway Com'rs*, 27 Barb. 94; *Clapper, Ex parte*, 3 Hill, 458.

<sup>6</sup> *King v. Somersetshire (Just.)*, 4 N. & M. 394; *King v. Mirehouse*, 2 Ad. & E. 632.

<sup>7</sup> *Carlton High Dale, Ex parte*, 4 N. & M. 312.

<sup>8</sup> *Q. v. Southampton*, 1 Best & S. 5; *Carlton High Dale, Ex parte*, 4 N. & M. 312.

<sup>9</sup> *Brokaw v. Highway Com'rs*, 130 Ill. 482.

ent court, which will settle the questions attempted to be raised by *mandamus*, the writ will be refused.<sup>1</sup> That a suit is pending to test the validity of a will is a sufficient return to a *mandamus* to grant probate thereof to the relator.<sup>2</sup> To an application to compel the county treasurer to execute two tax deeds to the relator, the answer was, that the respondent's predecessor made the relator a deed therefor, and a suit was now pending against him to set it aside. The court decided that the suit was pending in a court competent to settle the matter, and that the issuance of a writ of *mandamus* would be oppressive.<sup>3</sup> The writ, however, will issue, if such suit is merely colorable and not maintainable,<sup>4</sup> or will not fully determine the question, or complete justice cannot be obtained, and such decision will be no bar to another suit.<sup>5</sup> A *mandamus* was issued to a mayor and the capital burgesses to proceed to the election of two capital burgesses, there being two vacancies in the board, though a *quo warranto* was then pending to try the mayor's title.<sup>6</sup> Where it appeared that a *mandamus* proceeding had been filed in another court and there refused, an appellate court refused to grant a similar *mandamus* on an original proceeding, since it should hear and determine the questions involved by an appeal from the judgment rendered in the lower court.<sup>7</sup> Though the fact that there is a remedy in equity is no bar to a writ of *mandamus*, and is only a matter appealing to the discretion of the court on the subject,<sup>8</sup> yet if a cause involving the same questions is pending in a court of chancery, and that court can grant full and complete relief,<sup>9</sup> or is better adapted to regulate the rights of

<sup>1</sup> R. v. Wheeler, Cas. temp. Hardw. 99; People v. Chicago, 53 Ill. 424; People v. Hake, 81 Ill. 540; People v. Warfield, 20 Ill. 159; Swartz v. Large (Kans., Nov. 7, 1891), 27 Pac. R. 993; People v. Wiant, 48 Ill. 263; Oakes v. Hill, 8 Pick. 47; State v. Otoe Co. (Board Com'rs), 10 Neb. 384.

<sup>2</sup> R. v. Hay, 4 Burr. 2295.

<sup>3</sup> State v. Patterson, 11 Neb. 266.

<sup>4</sup> People v. State Treasurer, 24 Mich. 468.

<sup>5</sup> People v. Salomon, 51 Ill. 37.

<sup>6</sup> King v. Grampound (Mayor), 6 T. R. 301.

<sup>7</sup> People v. Thompson, 66 Cal. 398.

<sup>8</sup> Ante, § 55.

<sup>9</sup> Hardcastle v. Maryland, etc. R. R., 32 Md. 32.

the parties,<sup>1</sup> the writ will be refused. The court will not by this writ compel a party to disobey an injunction,<sup>2</sup> though the applicant was not a party thereto,<sup>3</sup> unless such action is necessary to protect his rights.<sup>4</sup> The applicant's remedy is to apply to be admitted as a party to the injunction proceedings.<sup>5</sup> If, however, the court believes the injunction to have been collusively obtained,<sup>6</sup> or to be plainly void for want of jurisdiction,<sup>7</sup> it will ignore it.

**§ 83. Discretion used in protecting the rights of third parties.**—The courts are very reluctant to grant this writ, when it may injuriously affect the rights of third parties who are not before the court, and for that reason have often refused it.<sup>8</sup> It has been refused when the granting thereof might involve such third parties in difficulties and hardships, or might give advantages over them,<sup>9</sup> which might embarrass them in suits growing out of the question.<sup>10</sup> The writ was applied for to compel a town treasurer to issue a warrant of distress against the tax collector, who failed to collect and pay over to the treasurer certain taxes in the time allowed by law. It appeared that those taxes were illegally assessed, so that the officer had no right to collect them, and in case of collection the tax-payers had a right to restitution thereof. The court in its discretion refused the writ, saying that it would not throw the tax-payers into an expensive field of litigation.<sup>11</sup> Where the owner of land, which was sold by the sheriff for non-payment of taxes, asked for a writ of *mandamus* to compel the sheriff to pay to him the surplus of the money received on each sale, the court in its discretion refused the writ, since there was an adequate remedy by suit at law against the sheriff, and also because

<sup>1</sup> *Q. v. Pitt*, 10 A. & E. 272.

<sup>2</sup> *People v. Warfield*, 20 Ill. 159.

<sup>3</sup> *Ohio, etc. R. R. v. Wyandotte Co. (Com'rs)*, 7 Ohio St. 278.

<sup>4</sup> *Atchison, etc. R. R. v. Jefferson Co. (Com'rs)*, 12 Kans. 127.

<sup>5</sup> *State v. Kispert*, 21 Wis. 387.

<sup>6</sup> *State v. Dubuclet*, 26 La. An. 127.

<sup>7</sup> *State v. Byers*, 67 Mo. 706; *Fleming, Ex parte*, 4 Hill, 581.

<sup>8</sup> *Oakes v. Hill*, 8 Pick. 47; *Ham v. Toledo, etc. R. R.*, 29 Ohio St. 174; *ante*, § 65.

<sup>9</sup> *People v. Forquer, Breese*, 68.

<sup>10</sup> *People v. Curyea*, 16 Ill. 547.

<sup>11</sup> *Waldron v. Lee*, 5 Pick. 323.

the sheriff's return showed that other parties claimed the money, who were not before the court in that proceeding.<sup>1</sup> A *mandamus* to compel a board of public works to vacate their approval of a plat of certain ground in a city was refused, because the makers of the plat, and the persons who were proved to have bought lots as established by that plat, were not before the court.<sup>2</sup>

**§ 84. The writ will not issue when another tribunal can require the act to be done.**— One of the cardinal principles connected with the issuance of the writ of *mandamus* is, that it will run only when there is no other remedy. For this reason the courts refuse to allow it to run against one who is subject to some other authority, which can compel the respondent to do the act desired and can punish for neglect or refusal.<sup>3</sup> When a county board of revenue has allowed a claim and ordered their clerk to draw a warrant on the county treasurer, a *mandamus* will not be allowed to compel him to do so, until the complainant has first unsuccessfully tried to have the board compel him.<sup>4</sup> When a railroad is in the hands of a receiver, a *mandamus* will not issue to such company and the receiver, directing their operations, because the court which first took control has exclusive jurisdiction and can do what is desired, while any interference would produce a clashing.<sup>5</sup> The propriety of using this writ to compel a sheriff to levy on certain property has been questioned.<sup>6</sup> This writ was not considered to be proper to compel a superintendent of police to discharge his official duty or to obey the orders of the board of police commissioners, when such board had power to remove him from office for such neglect.<sup>7</sup> The writ, when applied for by several of the aldermen of the city to com-

<sup>1</sup> State v. Turner, 32 S. C. 348.

<sup>4</sup> Parker v. Hubbard, 64 Ala. 203.

<sup>2</sup> Campau v. Board Public Works, 86 Mich. 372.

<sup>5</sup> State v. Marietta, etc. R. R., 35 Ohio St. 154.

<sup>3</sup> R. v. Surrey, 1 Chit. 650; Lord Littledale in R. v. Jeyes, 3 A. & E. 423.

<sup>6</sup> State v. Craft, 17 Fla. 722.

<sup>7</sup> State v. Murphy, 3 Ohio, C. C. 332.

pel the marshal of the city to place a police officer in a certain district, in accordance with the requirements of an order passed by the board of aldermen, was refused, because the mayor of the city had authority by the city charter to punish officers for neglect of duty. Though in this case the mayor refused to promulgate the order of the board of aldermen, the court considered it more expedient that the inconveniences of an exceptional case should be endured than that the court should be subject to be called on to compel any police officer to do his duty.<sup>1</sup> If, however, the proper tribunal fails to require the officer to perform the duty demanded from him, the writ of *mandamus* will be granted.<sup>2</sup> It has been considered that when an officer fails to do his duty, the proper remedy is by motion in the proper court,<sup>3</sup> or by action on his bond,<sup>4</sup> to which may be added, as above mentioned, as being allowable whenever there is no other adequate remedy, the right to compel his action by *mandamus*.<sup>5</sup> A court will refuse to issue a writ of *mandamus*, except in a case of urgent and immediate necessity, to enforce the process of an inferior court; since such inferior court, if it has the power to issue such process, has also power to compel obedience thereto; and if it has not the power to issue the process, the higher court cannot validate it by such writ of *mandamus*.<sup>6</sup>

§ 85. **The last rule not strictly observed.**—The rule, not to issue this writ to enforce duties which another person or tribunal can enforce, is only one of convenience, and the courts have often disregarded it and issued the writ, though the respondent was subject to another power which could compel the discharge of such duty. The writ has been issued to the clerk of a court to compel him: to issue an execution,<sup>7</sup> to issue a writ of assistance,<sup>8</sup> to furnish copies of

<sup>1</sup> Alger v. Seaver, 138 Mass. 331.

<sup>6</sup> People v. Edwards, 66 Ill. 59.

<sup>2</sup> State v. Le Fevre, 25 Neb. 223.

<sup>7</sup> People v. Gale, 22 Barb. 502;

<sup>3</sup> Cowell v. Buckelew, 14 Cal. 640.

Pickell v. Owen, 66 Iowa, 485.

<sup>4</sup> Fulton v. Hanna, 40 Cal. 278.

<sup>8</sup> Att'y-Gen'l v. Lum, 2 Wis. 507.

<sup>5</sup> Mocre v. Muse, 47 Tex. 210.



his court records on the payment of his fees,<sup>1</sup> to make out and deliver a transcript for use in a writ of error,<sup>2</sup> to receive and file the sheriff's bond after its approval by the court,<sup>3</sup> to issue an execution for the recovery of land and for damages,<sup>4</sup> and to issue a citation to those interested relative to the administration of an estate.<sup>5</sup> In these cases attention seems not to have been called to the fact that relief might have been obtained from the judge of the court of which the respondent was the clerk. But other courts have refused the writ for the reason mentioned. It was refused to compel the clerk to issue an execution,<sup>6</sup> and to spread on the records of the court certain orders made by the judge while holding court.<sup>7</sup>

§ 86. **A mandamus not issued to command A. to command B.**—This writ is used to direct a person to do a certain act, and will not lie to one person to command another to do a certain act,<sup>8</sup> which, it is said, would be absurd.<sup>9</sup> Where, however, it is the duty of A. to act only under instructions from B., the writ will lie to B. A writ of *mandamus* was issued to a city council to direct the city solicitor to proceed to sell according to law lands of delinquents to enforce the payment of taxes, the city council being authorized to cause such lands to be sold, and being charged with the duty of directing the city solicitor to proceed and sell them.<sup>10</sup>

§ 87. **Laches will bar relief by mandamus.**—The courts require those who would avail themselves of the assistance of this writ to be prompt in demanding the enforcement of their rights. By lapse of time the necessary evidence is lost, and third parties may acquire rights growing out of the existing state of affairs. Where the parties have been guilty of unreasonable delay in applying for this writ,

<sup>1</sup> *State v. Meagher*, 57 Vt. 398.

<sup>2</sup> *Davis v. Carter*, 18 Tex. 400.

<sup>3</sup> *People v. Fletcher*, 2 Scam. 482.

<sup>4</sup> *People v. Loucks*, 28 Cal. 68.

<sup>5</sup> *Carnochan, Ex parte*, Charl. 436.

<sup>6</sup> *Gooch v. Gregory*, 65 N. C. 142.

<sup>7</sup> *Cowell v. Buckelew*, 14 Cal. 640.

<sup>8</sup> *Rowland, Ex parte*, 104 U. S. 604.

<sup>9</sup> *Regina v. Derby (Mayor)*, 2 Salk.

<sup>10</sup> *State v. Camden*, 39 N. J. L. 620.

the courts have not hesitated to refuse such relief, unless the delay was accounted for to their satisfaction.<sup>1</sup> In determining what will constitute unreasonable delay, regard should be had to the circumstances which justify the delay, to the nature of the case and the relief demanded, and to the question whether the rights of the defendant or of other persons have been prejudiced by such delay.<sup>2</sup> A delay of twenty months was considered no laches relative to condemnation proceedings.<sup>3</sup> A delay of six years in applying for a *mandamus* to compel the issue of a township bond for having volunteered as a veteran in the war was considered to be *ipso facto* too great.<sup>4</sup> A delay of over three years before applying for a *mandamus* to levy a tax in order to refund money paid by the relator on an erroneous assessment was considered to be too great, the law limiting suits to recover taxes erroneously paid to three years.<sup>5</sup> A *mandamus* to compel the county officers to remove their offices to a place claimed to have been selected at an election as the county seat was refused, because the election was held two years before, and an injunction had been granted then to prevent a count of the vote on the ground that the election was fraudulent.<sup>6</sup> A *mandamus* to make a court hear a complaint against the erection of a bridge, made twenty-six years after the bridge was constructed, was refused.<sup>7</sup> The writ was refused for unreasonable delay, when it was sought to compel a canal company to enroll in a public office certain contracts for the purchase of land

<sup>1</sup> Walcott v. Mayor, 51 Mich. 249; Avery v. Krakow (Tp.), 73 Mich. 622; State v. Earle, 42 N. J. L. 94; Savannah (Mayor) v. State, 4 Ga. 26; People v. Chapin, 104 N. Y. 96; Gray v. Saginaw Co. (Judge), 49 Mich. 628; Bostwick v. Fire Dept., 49 Mich. 513; State v. Columbia, 22 S. C. 582; State v. Knight, 31 S. C. 81; State v. Kirby, 17 S. C. 563; Q. v. All Saints (Ch. Wardens), 1 Ap. Cas. 611.

<sup>2</sup> People v. Syracuse (Com. Council), 78 N. Y. 56; Chinn v. Trustees, 32 Ohio St. 236.

<sup>3</sup> People v. Syracuse (Com. Council), 78 N. Y. 56.

<sup>4</sup> Chinn v. Trustees, 32 Ohio St. 236.

<sup>5</sup> George's Creek, etc. Co. v. Alleghany Co. (Com'rs), 59 Md. 255.

<sup>6</sup> Golden v. Elliott, 13 Kans. 92.

<sup>7</sup> King v. Cambridgeshire (Just.), 1 D. & R. 325.

after the company had been in possession of the land for sixty-five years.<sup>1</sup> A delay for eight years in demanding payment of a claim against a county was considered to justify the refusal of a writ of *mandamus* to compel payment.<sup>2</sup>

§ 88. **Discretion of court when the state is relator.**—The discretion of the court in granting or refusing this writ has been denied in cases where the state asked for it in matters *publici juris*. In such cases the writ was considered to be purely prerogative, and it was held that it must be issued *ex debito justitiæ*, and that the courts had no discretion in the matter.<sup>3</sup> It was considered that the writ must issue, as the absolute right of the state, to compel a county treasurer to pay over the money collected by him for state taxes,<sup>4</sup> and to enforce an act of the legislative for the public benefit on the application of the state's attorney.<sup>5</sup> In these decisions the courts generally refer to Mr. Tapping's work on *Mandamus*. The authorities cited by Mr. Tapping in support of this proposition do not sustain his assertion. The only authority cited by him which alludes to the proposition is *King v. Evesham*, Kel. 243, which is also reported as *Anon.*, 2 Barn. 236. There it is said that that writ is a writ of right, and when the party has sufficient matter before the court, he is entitled to it *de jure* or *ex debito justitiæ*. That case seems to have been prosecuted by the parties in interest and not by the attorney-general. Since now in this country the writ of *mandamus* is looked upon rather as a writ of right, and the limitations and rules regulating the discretion of the court in refusing the writ are well defined, it would seem that the application of a state's attorney for the writ should be subject to the same rules which apply in other cases, since the state's attorney may interfere in all cases, for the writ, as a general rule, only issues in matters of public right.

<sup>1</sup> *Q. v. Leeds & Co.*, 11 A. & E. 316.

<sup>4</sup> *Aplin v. Van Tassel*, 73 Mich. 28.

<sup>2</sup> *State v. Appleby*, 25 S. C. 100.

<sup>5</sup> *New Haven, etc. R. R. v. State*,

<sup>3</sup> *State v. Doyle*, 40 Wis. 220; 44 Conn. 376.

*Att'y-Gen'l v. Chicago, etc. R. R.*,

35 Wis. 425.

## CHAPTER 7.

### MANDAMUS AGAINST THE STATE.

§ 89. Cannot obtain a *mandamus* indirectly by obtaining one against an officer.

90. When the writ goes against the officers to enforce a liability of the state.

§ 89. Cannot obtain a *mandamus* indirectly by obtaining one against an officer.—In England it is well settled law that the writ of *mandamus* will not run against the sovereign. The reasons assigned for this ruling are, that it is incongruous for the sovereign to command himself to do an act, and because in case of disobedience the command of the writ is enforced by attachment of the person.<sup>1</sup> In America the same conclusion is reached, but the reason therefor is because no suit can be brought against a state, unless it consents thereto.<sup>2</sup> In neither country will litigants be allowed to evade this rule, and the writ of *mandamus* will not be allowed to run against the servants of the crown or state, as such, in order to enforce the satisfaction of claims upon the crown or state.<sup>3</sup> The writ cannot be used to make a contract which will bind the state,<sup>4</sup> as to compel the executive council to contract with the relator, as the lowest bidder, to publish the state reports;<sup>5</sup> nor can it be used to compel a state to fulfill its contract,<sup>6</sup> as to

<sup>1</sup> *Q. v. Powell*, 1 Q. B. 351; *R. v. R.* 7 Q. B. 387; *Cunningham v. Customs (Com'rs)*, 5 A. & E. 380. *Macon, etc. R. R.*, 109 U. S. 446;

<sup>2</sup> *Ottawa Co. (Sup'rs) v. Auditor-Gen.*, 69 Mich. 1; *Aplin v. Grand T. Co.*, 73 Mich. 182; *People v. Dulaney*, 96 Ill. 503; *State v. Burke*, 33 La. An. 498.

<sup>3</sup> *De Bode, In re*, 6 Dowl. 776; *Q. v. Lords Com'rs of the Treasury*, L. 7 Q. B. 387; *Cunningham v. Macon, etc. R. R.*, 109 U. S. 446; *State of Miss. v. Durham*, 15 Dist. Col. 235.

<sup>4</sup> *Chance v. Temple*, 1 Iowa, 179. <sup>5</sup> *Mills Pub. Co. v. Larrabee*, 78 Iowa, 97. <sup>6</sup> *Ayers, In re*, 123 U. S. 443, 503; *People v. Dulaney*, 96 Ill. 503.

compel the secretary of state to deliver copies of certain laws to the public printer to print, when by subsequent statute the printing thereof is to be let to the lowest bidder.<sup>1</sup> The writ has been denied, as being indirectly a suit against the state: to compel the commissioner of the state general land office to issue patents for the state lands without paying the fees due to the state therefor;<sup>2</sup> to make state officers pay out money in the absence of an appropriation,<sup>3</sup> and of a warrant;<sup>4</sup> to compel the auditor-general to pay over to a county treasurer the proceeds of certain taxes collected by him;<sup>5</sup> and to compel the state treasurer and auditor to audit and pay certain coupons according to a statute after the passage of a subsequent statute, which appropriated the funds to another purpose.<sup>6</sup> The courts are not authorized, when a state cannot be sued, to set up their jurisdiction over officers in charge of the public moneys so as to control them as against the political power in their administration of the finances of the state. The officers owe duty to the state alone. They can only act as the state directs them to act, and hold as the state allows them to hold. They can be moved through the state, but not the state through them.<sup>7</sup> Where a *mandamus* was applied for to compel a county to levy a tax to pay its indebtedness to the state, and in another case to compel a county treasurer to pay over money collected by him for the state, the county was not allowed to assert a set-off against the state, because the state could not be sued directly or indirectly.<sup>8</sup> A *mandamus* was sought to compel the admission to a customary or copyhold estate. Such writs were formerly brought against the steward alone, but the court had ruled that the writ must also run against the lord of the manor in order more effectually to protect his rights. In this case the queen was the lord of

<sup>1</sup> Marshall v. Clark, 22 Tex. 23.  
*Contra* in State v. Barker, 4 Kans.  
 379, wherein only the inviolability  
 of a contract is considered.

<sup>2</sup> Taylor v. Hall, 71 Tex. 206.

<sup>3</sup> Carr v. State, 127 Ind. 204.

<sup>4</sup> Weston v. Dane, 51 Me. 461.

<sup>5</sup> Ottawa Co. v. Auditor-Gen., 69  
 Mich. 1.

<sup>6</sup> State v. Burke, 33 La. An. 498.

<sup>7</sup> Louisiana v. Jumel, 107 U. S. 711.

<sup>8</sup> Aplin v. Van Tassel, 73 Mich.  
 28; Aplin v. Grand Traverse Co.  
 (Sup'rs), 73 Mich. 182.

the manor. The relator sought to have the writ run to the steward alone. The court stated that, if the writ were obeyed when issued to the steward alone, the property of the crown would be indirectly affected, and that the crown was as much entitled to protection as a subject. The writ was therefore refused, since it could not issue against the sovereign.<sup>1</sup>

§ 90. **When the writ goes against the officers to enforce a liability of the state.**—It does not, however, follow that this writ is never issued to compel the performance of a ministerial act connected with the liabilities of the government. There are cases when the writ will so issue, yet they must be where the government itself is liable and is willing to pay its debt, but the officer himself has improperly refused to act.<sup>2</sup> Where money was appropriated to pay the arrears of the relator's pension, and the lords of the treasury admitted to him they had the money appropriated for him, a *mandamus* was issued against them to compel them to issue an order therefor in the relator's favor. They were officers of the crown, but this was only the case of public officers having control of a sum of money for a particular purpose.<sup>3</sup> When such officers act merely as servants of the crown, amenable alone to the crown, owing no duty to the relator, the writ is refused. Where the lords commissioners of the treasury had received the money to pay the costs of criminal prosecutions, they were not required to pay certain items of a criminal prosecution.<sup>4</sup> Where the amount appropriated to pay a pension was thrown into the general fund applicable to other accounts, and never reached the lords commissioners of the treasury for the purpose of paying that pension, a *mandamus* to compel them to use it to pay that pension was refused.<sup>5</sup>

<sup>1</sup> Q. v. Powell, 1 Q. B. 351.

<sup>4</sup> Q. v. Lords Com'rs of the Treasury, L. R. 7 Q. B. 387.

<sup>2</sup> Reeside v. Walker, 11 How. 272;

Chance v. Temple, 1 Iowa, 179.

<sup>5</sup> King v. Lords Com'rs of the

<sup>3</sup> King v. Lords Com'rs of the Treasury, 4 A. & E. 984.  
Treasury, 4 A. & E. 286.

## CHAPTER 8.

### MANDAMUS TO THE EXECUTIVE OFFICERS OF THE GOVERNMENT.

- § 91. The three co-ordinate independent branches of the government.
- 92. *Mandamus* to the president of the United States.
- 93. *Mandamus* to the governor of a state.
- 94. *Mandamus* refused against the governor of a state.
- 95. A case wherein decided that the writ would not issue against a governor.
- 96. Case where it was decided that a governor is amenable to this writ.
- 97. Deductions from the decisions.
- 98. *Mandamus* to the governor of a state from a federal court.
- 99. *Mandamus* to other executive officers.
- 100. *Mandamus* to heads of federal executive departments.
- 101. Cases of *mandamus* to heads of federal executive departments.
- 102. *Mandamus* to the secretaries of state of the various states.
- 103. *Mandamus* to a state treasurer.
- 104. *Mandamus* to the comptroller of a state.
- 105. *Mandamus* to the auditor of a state.
- 106. *Mandamus* to commissioner of state land office.

§ 91. **The three co-ordinate independent branches of the government.**— In the constitutions of the several states, and in that of the United States, the powers of government are divided between three departments,—the legislative, judicial and executive. One department enacts the laws, another interprets them, and the third enforces them. These departments are co-ordinate branches of the government, entirely independent of each other, and each is supreme in its own domain. It then became important to determine to what extent the judiciary department could interfere in the operations of the other departments by the use of the writ of *mandamus*. While on the one hand it is claimed that the judiciary must be supreme in the determination of all questions which come before it in the course

of legal proceedings, yet on the other it is asserted that the other departments, being supreme in their spheres of action, cannot be controlled by the judiciary, nor can the judiciary direct them or supervise them in the performance of their duties.

**§ 92. Mandamus to the president of the United States.—**

At an early period in the history of this country the supreme court of the United States, which in such cases is the final judicial arbiter, determined that the president of the United States, so far as his powers are derived from the constitution, is beyond the reach of any other department except the impeaching power; that his powers are political, and in the exercise thereof he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience.<sup>1</sup> As a consequence of these decisions, no one has ever sought to obtain a *mandamus* against the president of the United States.

**§ 93. Mandamus to the governor of a state.—** The governors of the various states occupy a position similar to that of the president of the United States, being the heads of the executive departments of their respective states, and the constitutions of the various states generally specifically state, which the United States constitution does not, that the legislative, judicial and executive departments shall be distinct and independent of each other, and that the officers of one department shall execute none of the duties of either of the other departments. As might be expected, the rulings of the various state supreme courts are not in harmony on the question whether a *mandamus* can be issued to a state governor. Those courts which grant the writ against the state governor claim that the judiciary is supreme in its domain, and that therefore the authority of the judiciary is supreme in the determination of all legal questions involved in any matter judicially brought before it;<sup>2</sup> that the law exempts no one from the operation of the

<sup>1</sup> *Marbury v. Madison*, 1 Cranch, 137; *Kendall v. United States*, 12 Pet. 524.

<sup>2</sup> *People v. Brooks*, 16 Cal. 11.



writ of *mandamus*; that the governor is specially sworn to enforce the laws faithfully; and that if the writ were refused, in many cases persons would be deprived of their rights without the possibility of obtaining any redress.<sup>1</sup> Therefore it has been held that the writ will issue to a governor to perform any ministerial duty.<sup>2</sup> The writ has been issued to a governor to administer the oath of office to officers-elect, and to issue to them their commissions, as being merely ministerial duties, though imposed by the state constitution.<sup>3</sup> The performance of the following duties imposed on the governor by statute was enforced by *mandamus*, viz.: the commissioning of the clerk of a court,<sup>4</sup> the issuance of a warrant for the attorney-general's salary,<sup>5</sup> the auditing of an officer's claim for expenses in returning a prisoner to the territory,<sup>6</sup> the commissioning of officers chosen by the legislature,<sup>7</sup> the issuance of state bonds to a railroad company,<sup>8</sup> the authentication of a bill in his possession as a statute,<sup>9</sup> and the issuance of a proclamation that a bank was authorized to begin business.<sup>10</sup> A duty imposed by statute on a governor, which might as well have been imposed on any other officer, was considered to be ministerial and enforceable by *mandamus*,<sup>11</sup> such as the signing of a patent for land.<sup>5</sup> A duty which the governor was required to perform with others, who had equal powers therein with him, has been held not to be a duty growing out of his official position, and therefore the writ would run against him, as in the case of any other party upon whom public

<sup>1</sup> State v. Martin, 38 Kans. 641.

<sup>8</sup> Tennessee R. R. v. Moore, 36

<sup>2</sup> State v. Martin, 38 Kans. 641; Chumasero v. Potts, 2 Mont. 242; State v. Thayer (Neb., Jan. 2, 1891), 47 N. W. Rep. 704.

Ala. 371. In this state it was subsequently doubted whether a *mandamus* should issue in any case to the governor. Chisholm v. McGehee, 41 Ala. 192.

<sup>3</sup> Magruder v. Swan, 25 Md. 173; Groome v. Gwin, 43 Md. 572.

<sup>9</sup> Harpending v. Haight, 39 Cal. 189.

<sup>4</sup> Bonner v. State, 7 Ga. 473.

<sup>5</sup> Cotten v. Ellis, 7 Jones, 545.

<sup>10</sup> State v. Chase, 5 Ohio St. 528.

<sup>6</sup> Territory v. Potts, 3 Mont. 364.

<sup>11</sup> People v. Brooks, 16 Cal. 11;

<sup>7</sup> State v. Moffitt, 5 Ohio, 358; Baker v. Kirk, 33 Ind. 517.

State v. Drew, 17 Fla. 67.

<sup>12</sup> Middleton v. Low, 30 Cal. 596.

duties devolved. Thus he has been required to meet with certain officials and to canvass the votes cast for a certain office.<sup>1</sup> The writ has been issued to control the action of a board of which the governor as such was a member, relative to certain state bonds.<sup>2</sup>

§ 94. **Mandamus refused against the governor of a state.**—On the other hand a larger number of state courts hold that the writ of *mandamus* will never run against the governor of a state, assigning as reasons for such ruling political necessity and public policy,<sup>3</sup> regardless of whether duty be imposed upon him by the state constitution<sup>4</sup> or by statute.<sup>5</sup> It is considered to be immaterial that the duty might have been imposed on another person, since it is imposed on the governor *eo nomine*, and its performance is an executive act under the responsibility of his executive station and under the sanctity of his official oath.<sup>6</sup> The reasons assigned for not issuing a *mandamus* to a governor are, that such action would imply that the executive power is dependent on and inferior to the judiciary;<sup>7</sup> that such

<sup>1</sup>State v. Thayer (Neb., Jan. 2, 1891), 47 N. W. Rep. 704; State v. Foster, 38 Ohio St. 599.

<sup>2</sup>Gray v. State, 72 Ind. 567; Hovey v. State, 127 Ind. 588. The rule adopted in Indiana is, that the writ will not run in any case against the governor relative to his action as such. In another state, where it is held that the writ never issues against the governor, it was refused against the board of which he was a member. Since he was a member of the board by virtue of his office, his acts therewith were considered to be acts *virtute officii* and exempt from judicial control. State v. Board of Liquidation, 42 La. An. 647.

<sup>3</sup>Hawkins v. Governor, 1 Ark. 570; People v. Cullom, 100 Ill. 472; State v. Governor, 39 Mo. 388;

Hartman's Appeal, 85 Pa. St. 433; Directors (Board) v. Wolfley (Ariz.), 22 Pac. R., 383; People v. State Auditors (Board), 42 Mich. 422; People v. Yates, 40 Ill. 126; People v. Bissell, 19 Ill. 229; People v. Hatch, 33 Ill. 9; Bates v. Taylor, 87 Tenn. 319; State v. Towns, 8 Ga. 360; Vicksburg R. R. v. Lowry, 61 Miss. 102.

<sup>4</sup>State v. Governor, 25 N. J. L. 331; Mauran v. Smith, 8 R. I. 192.

<sup>5</sup>People v. Governor, 29 Mich. 320; Rice v. Austin, 19 Minn. 103.

<sup>6</sup>Dennett, Petitioner, 32 Me. 508; Turnpike Co. v. Brown, 8 Baxt. 490; State v. Whitcomb, 28 Minn. 50; People v. Governor, 29 Mich. 320.

<sup>7</sup>State v. Governor, 39 Mo. 388; State v. Drew, 17 Fla. 67; Mauran v. Smith, 8 R. I. 192.

action would tend to bring the two departments into a conflict, wherein the court would have no ability to enforce its decrees, and such a result should be considered in a case where the right to issue the writ is doubtful,<sup>1</sup> and courts in such matters should not tread on doubtful ground;<sup>2</sup> that the punishment for disobedience of the writ is by a proceeding for contempt, and since the court cannot deprive the state of its head, therefore it has not the power to issue this writ to the governor;<sup>3</sup> that the state constitution expressly provides that one department shall not exercise any of the duties of either of the other departments,<sup>4</sup> and that the governor has a right to determine for himself what duties he is required to perform, and therefore has a right to determine what duties are discretionary and what are ministerial, and consequently the courts have no right to determine that matter for him.<sup>5</sup> When a governor voluntarily submitted himself to the jurisdiction of the court, the court proceeded to adjudge the matter;<sup>6</sup> but in another case the court said the governor might submit the case in order to obtain the court's advice, but it disclaimed any right to control his action;<sup>7</sup> and in another case it was decided that this exemption from any interference by the judiciary was established as a protection to the office, and that the incumbent was not allowed to waive it.<sup>8</sup>

**§ 95. A case wherein decided that the writ would not issue against a governor.**—The whole question is well considered in *People v. Governor*, 29 Mich. 320, where Cooley, J., in delivering the opinion of the court, says:

“There is no very clear and palpable line of distinction between those duties of the governor which are political,

<sup>1</sup> *Mauran v. Smith*, 8 R. I. 192;  
State v. Governor, 39 Mo. 388.

<sup>2</sup> State v. Governor, 25 N. J. L.  
331.

<sup>3</sup> State v. Drew, 17 Fla. 67.

<sup>4</sup> State v. Dike, 20 Minn. 363;  
Western R. R. v. De Graff, 27 Minn.  
1; State v. Whitcomb, 28 Minn.

50; *Bledsoe v. International R. R.*,  
40 Tex. 537; *Hovey v. State*, 127  
Ind. 588.

<sup>5</sup> State v. Warmoth, 22 La. An. 1;  
Hartranft's Appeal, 85 Pa. St. 433.

<sup>6</sup> State v. Marks, 74 Tenn. 12.

<sup>7</sup> *People v. Bissell*, 19 Ill. 229.

<sup>8</sup> State v. Dike, 20 Minn. 363.

and those which are to be considered ministerial merely; and if we could undertake to draw one, and to declare that in all cases falling on one side the line the governor was subject to judicial process, and in all falling on the other he was independent of it, we should open the doors to an endless train of litigation, and the cases would be numerous in which neither the governor nor the parties would be able to determine whether his conclusion was under the law to be final, and the courts would be appealed to by any dissatisfied party to subject a co-ordinate department of the government to their jurisdiction. However desirable a power in the judiciary to interfere in such case might seem from the stand-point of interested parties, it is manifest that harmony of action between the executive and judicial departments would be directly threatened, and that the exercise of such power could only be justified on most imperative reasons. . . . The presumption in all cases must be, where a duty is devolved upon the chief executive of the state rather than upon an inferior officer, that it is so because his superior judgment, discretion and sense of responsibility were confided in for a more accurate, faithful and discreet performance than could be relied upon if the duty was devolved upon an officer chosen for inferior duties. . . . Our government is one whose powers have been carefully apportioned between three distinct departments, which emanate alike from the people, have their powers alike limited and defined by the constitution, are of equal dignity, and within their respective spheres of action equally independent. . . . This division is accepted as a necessity in all free government, and the very apportionment of power to one department is understood to be a prohibition of its exercise by either of the others.

“It is not attempted to be disguised on the part of the relators that any other course than that which leaves the head of the executive department to act independently in the discharge of his duties might possibly lead to unseemly conflicts, if not to something worse, should the courts un-

dertake to enforce their mandates and the executive refuse to obey. . . . Orders in these cases can only be enforced by process for the punishment of contempts of court, and it is conceded that the governor might submit, or not, at his option; so that our decision in effect could be only advisory. And while we should concede, if jurisdiction were plainly vested in us, the inability to enforce our judgment would be no sufficient reason for failure to pronounce it, especially against an officer who would be presumed ready and anxious in all cases to render obedience to the law, yet in a case where jurisdiction is involved in doubt it is not consistent with the dignity of the court to pronounce judgments which may be disregarded with impunity, nor with that of the executive to place him in position where, in a matter within his own province, he must act contrary to his judgment or stand convicted of a disregard of the laws.

“ But it is said that this conclusion will leave parties, who have rights, in many cases without remedy. Practically, there are a great many such cases, but theoretically there are none at all. All wrongs certainly are not redressed by the judicial department. A party may be deprived of a right by a wrong verdict or an erroneous ruling of a judge, and though the error may be manifest to all others than those who are to decide upon his rights, he will be without redress. A person lawfully chosen to the legislature may have his seat given by the house to another, and be thus wronged without remedy. A just claim against the state may be rejected by the board of auditors, and neither the governor nor the courts can grant relief. A convicted person may conclusively demonstrate his innocence to the governor and still be denied a pardon. In which one of these cases could the denial of redress by the proper tribunal constitute any ground for interference by any other authority? The law must leave the final decision upon every claim and every controversy somewhere, and when that decision has been made, it must be accepted as correct. The presumption is just as conclusive in favor of executive

action as in favor of judicial. The party, applying for action which, under the constitution and laws, depends on the executive discretion, or is to be determined by the executive judgment, if he fails to obtain it, has sought the proper remedy and must submit to the decision."

§ 96. **Case where it was decided that a governor is amenable to this writ.**—The opposite view of this question is vigorously maintained in *Martin v. Ingham*, 38 Kans. 641, where Valentine, J., in delivering the opinion of the court, says: "It is generally supposed that in a republican government all men are subject to the laws, and to the due administration of them, and that no man nor any class of men is exempt. There is no express provision in the constitution, nor in any statute, exempting any member of the executive department, chief or otherwise, from being sued in any of the courts of Kansas, or in any action coming within the jurisdiction of any particular court, civil or criminal, upon contract or upon tort, in *quo warranto*, *habeas corpus*, *mandamus*, or injunction; or from being liable to any process or writ properly issued by any court, as subpoenas, summonses, attachments, and other writs or process; and if any one of such officers is exempt from all kinds of suits in the courts, and from all kinds of process issued by the courts, it must be because of some hidden or occult implications of the constitution or the statutes, or from some inherent and insuperable barriers founded in the structure of the government itself, and not from the express provisions of the constitution or the statutes. . . . In all other cases it is not the rank or character of the individual officer, but the nature of the thing to be done which governs. No other officer is above the law; and every other officer, to whatever department he may belong, may be compelled to perform a purely ministerial duty. The objection oftenest urged against the court's exercising control over any of the acts of the governor is that the three departments of government, the legislative, the judicial, and the executive, are separate and distinct, and that each is equal

to, co-ordinate with, and wholly independent of, the other. Now it is true, with some exceptions, that the legislature cannot exercise judicial or executive power, and that the executive department cannot exercise legislative or judicial power; but it is not true that they are entirely separate from each other or independent of each other, or that one of them may not in some instances control one of the others. The most of the jurisdiction possessed by the courts depends entirely upon the acts of the legislature, and the entire procedure of the courts, civil and criminal, is prescribed by the legislature. Nearly all the duties of the governor are imposed upon him by the legislature. The legislature may also impeach the governor or any other state or judicial officer mentioned in the constitution. The courts may construe all the acts of the legislature, whether such acts have been signed by the governor or not, and may determine whether they are in contravention of the constitution or not, and if believed to be in contravention of the constitution, may hold them void. The courts may also determine that a supposed member of the legislature is not a member at all, because he represents no district; and may also determine that the legislature cannot consist of more than a certain number of members. *Prouty v. Stover, Lieut. Governor*, 11 Kans. 235; *The State ex rel. v. Tomlinson*, 20 id. 692; *The State ex rel. v. Francis, Treas.*, 26 id. 724. The courts may also pass upon the validity of the acts of the governor. *The State v. Ford County*, 12 Kans. 441. It is also believed that the courts have power to require the governor to attend a trial as a witness; and if so, then have they not the further power to imprison him for contempt if he disobeys? And if so, would not the courts then interfere with his ability to perform his executive duties? In such a case the state might have to rely upon the lieutenant-governor. No act of the legislature can become a law unless it is presented to the governor for his signature and approval. The governor may also convene the legislature whenever he chooses. Also the legislature

and the courts are able to perform their respective duties unmolested, because of the known power of the governor to call out the militia to aid and protect them in doing so if necessary. It will be seen from the foregoing that the different departments of the government are not independent of each other. The power last mentioned, however, is also invoked as an argument against the court's attempting to control any act or acts of the governor. It is said that if the governor opposes the order or judgment of the court, it cannot be enforced; for it is said that he has the entire control of the militia. But are the courts to anticipate that the governor may not perform his duties? Should not the courts rather presume that when a controversy is determined by the courts — the only tribunals authorized by the constitution or the statutes to construe the laws, and to determine controversies by way of judicial determination — the governor, as chief executive officer of the state, would see that such determination should be carried into full effect? Such would be his duty, and no one should suppose that he would fail to perform his duty, when his duty is made manifest by a judicial determination of the courts. No department should ever cease to perform its functions for fear that some other department may render its acts nugatory, or for fear that its acts may in some manner affect the conduct or *status* of some other department. . . . Each department should scrupulously perform the duties peculiarly intrusted to its own department without reference to how the same might affect other departments. Besides, if this argument from the governor's control of the militia were carried to its full extent, it would prevent any court from ever issuing any subpœna or any other writ or process to the governor, or from ever arresting him or ordering his arrest for any assault or battery, or for anything else, because the governor might in any such case refuse to obey the writ or the order of the court, and might call on the militia to assist him in his resistance. . . . It will thus be seen that while each of the different depart-



ments of the government is superior to the others in some respects, yet that each is inferior to the others in other respects; and it is always difficult to compare things which are wholly unlike each other, or to call them equal. Each department in its own sphere is supreme. But each outside of its own sphere is weak and must obey. . . . If an applicant for relief on the ground of the refusal to exercise or the wrongful exercise of ministerial power by the governor has no remedy in the courts, then he has no remedy at all. The remedy of impeachment, and the remedy of subsequent elections, suggested by some of the courts, may be a remedy to the public in general, but it cannot be a remedy to an individual sufferer for injuries or loss in person or to his property."

§ 97. **Deductions from the decisions.**—The weight of authority is evidently in favor of the proposition that the writ of *mandamus* will never lie from a state court to the governor of the state, but such proposition can hardly be considered to be established on the ground of constitutional prohibition, and it will be perceived, when we consider the right of courts to issue this writ to the heads of the various branches of the executive department, that the constitutional inhibition is maintained in only two of the states. But it seems to be impossible to preserve an isolation between the three departments. To do so all the officers and agents of the executive department should be free from all judicial control. But the courts are continually restraining and directing the actions of the executive officers, and they often nullify the action of the governor, which is practically an interference in his domain. The courts have interfered with the actions of the officers of the legislative department by requiring them to make certain certificates, to open and publish before the assembled legislature the returns of the election, and by deciding in a collateral proceeding a membership in the legislature, when the legislature has failed to act. In a *mandamus* proceeding to compel the secretary of state to deliver the election returns to the speaker of the

house of representatives for presentation to the latter, the court decided which of two bodies, each claiming to be the house of representatives, was the legal house.<sup>1</sup> It should be stated that all the courts which have so ruled, except one, which does not seem to have been called on to act, have maintained the right to issue a *mandamus* to the governor of the state. The courts have interfered in the question of the governorship of the state. It has been said, though rather as an *obiter dictum*, that he who is entitled to the office of governor of a state may obtain it by the writ of *mandamus*; <sup>2</sup> but in two cases the courts have interfered by the writ of *quo warranto* and have turned out the incumbents to seat the parties whom they considered to be entitled to the office.<sup>3</sup> For such action the plea of necessity may be urged, but it is in the highest degree an interference with a co-ordinate branch of the government. It attacks its very existence, as represented by the person who is executing its functions. The same may be said when the courts undertake to decide (and why not directly as well as indirectly?) what bodies of men constitute the legislature. If necessity is the plea for such action, who is to determine the question when each of two bodies claims to constitute the highest judicial tribunal? A constitutional convention vacated the seats of all the judges of the supreme court and authorized the governor to fill the vacancies thus created, which he proceeded to do. The old court claimed that the action of the constitutional convention was void and undertook to discharge their official functions, when the governor removed them by force and installed his appointees, whose rights were never questioned afterwards.<sup>4</sup> Fortunately such cases seldom arise, yet they show that the courts cannot cope with all the difficulties, and if they cannot act in some cases it cannot follow that they are necessarily the parties to pass on other cases, where

<sup>1</sup> See § 107.<sup>2</sup> Goff v. Wilson, 32 W. Va. 393.<sup>3</sup> Attorney-General v. Barstow, 4

Wis. 567; State v. Boyd (Neb., May 5, 1891), 48 N. W. Rep. 739.

<sup>4</sup> Preface to 35 Mo. Reports.

political questions of a similar nature are involved, namely, the independence of the various co-ordinate branches of the government. When it is remembered that the use of this writ is the outgrowth of necessity in order to meet the demands of justice, and its issuance is largely dependent upon the discretion of the court, its use to determine the legality of a body claiming to be a legislature seems questionable, while its issue to compel an action by the governor, on account of the uncertainty as to whether it will be obeyed, and the possibilities of a public scandal produced thereby, would seem to be entirely inappropriate.

§ 98. **Mandamus to the governor of a state from a federal court.**—What has been said relative to the issuance of a *mandamus* from a state court to the governor of a state does not apply when the writ is issued from a federal court. The United States in its domain is superior to the states, and in enforcing its laws deals with all persons as individuals, owing obedience to its authority. Nothing can be interposed between the individual and the obligation he owes to the constitution and laws of the United States, which can shield or defend him from their just authority, and the extent and limits of that authority the United States, by its judiciary, interprets and applies for itself. If, therefore, an individual, acting under the assumed authority of a state as one of its officers, and, under color of its laws, comes into conflict with the superior authority of the United States, he is stripped of his representative character and subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States.<sup>1</sup> A governor, as a member of a board, has been required by injunction to conform in its actions to a state law: the court held that the writ of *mandamus* or that of injunction would lie in such cases, and that therein the two writs were somewhat correlative.<sup>2</sup>

<sup>1</sup> *Ayers, In re*, 123 U. S. 443.

*Comb*, 92 U. S. 531; *Rolston v. Mis-*

<sup>2</sup> *Board of Liquidation v. Missouri Fund Com'rs*, 120 U. S. 390.

To evade the performance of his duty, an officer cannot plead an unconstitutional law of the state, since the federal court will treat such law as null and void, and it will not prevent the issuance of the proper writ.<sup>1</sup> With the exception of a few cases of original jurisdiction of the supreme court, a state cannot be sued in the federal courts without its consent, and therefore a writ of *mandamus* cannot be maintained when in effect it is a suit against the state. Therefore, when a state has contracted to dispose of its taxes in a certain way, but subsequently passes a law making a different disposition thereof, it cannot be compelled to carry out such contract by requiring its officers to dispose of such funds according to such contract so long as such funds are in the possession of the state, and if such officers in their relations thereto are not trustees thereof but mere agents of the state.<sup>2</sup>

§ 99. *Mandamus to other executive officers.*—The questions of political necessity and public policy, which present themselves when an application is made to coerce a governor of a state, do not exist in the case of any other officer. The courts, therefore, do not decline to issue this writ to any other officer to compel the performance of a mere ministerial duty. Apparently the only courts holding otherwise are those of Minnesota and Texas, which base their decisions on their constitutional provisions that the three coordinate branches of government shall be entirely separate.<sup>3</sup> Where, however, the heads of departments or any other officers act in any transaction as the political or confidential agents of the president of the United States, or of a state governor, and subject to the will of their principals, their acts therein are the acts of their principals, and no writ of *mandamus* will lie to control them in any manner in such transaction.<sup>4</sup> Inasmuch as it is impossible to formulate any

<sup>1</sup> Board of Liquidation v. McComb, 92 U. S. 531, 541; Poindexter v. Greenhow, 114 U. S. 270.

<sup>2</sup> Louisiana v. Jumel, 107 U. S. 711.

<sup>3</sup> State v. Dike, 20 Minn. 363; State v. Braden, 40 Minn. 174; Bledsoe v. International R. R., 40 Tex. 537.

<sup>4</sup> Marbury v. Madison, 1 Cranch,

sensible distinction applicable to all cases between discretionary and ministerial acts, the refinements and mere verbal distinctions being such as to leave an almost unlimited discretion to the courts,<sup>1</sup> it may be well to call attention to a number of decisions in cases of *mandamus* to executive officers as being the best guides in elucidating the distinction made in the courts.

§ 100. **Mandamus to heads of federal executive departments.**— The head of an executive department of the federal government will never be interfered with in the ordinary discharge of his official duties,<sup>2</sup> even when those require an interpretation of the law.<sup>3</sup> The writ has been refused: to compel the interior department to issue a patent for public lands;<sup>4</sup> to compel the secretary of the navy to allow a widow, to whom a pension had been granted under a special act of congress, and who had applied for and received a pension under the general law, the pension under the special law, the secretary denying her right to take both pensions;<sup>5</sup> to compel the commissioner of patents to re-issue a patent to an assignee thereof, he having decided that he was not such an assignee as to be entitled thereto under the law;<sup>6</sup> to compel the secretary of the navy to pay his salary to a person who had been an officer in the Texas navy, and who claimed, by virtue of the transfer of that navy to the United States, to be an officer in the United States navy;<sup>7</sup> to reverse the decision of the commissioner of pensions in refusing an increase of pensions;<sup>8</sup> to make the secretary of the treasury pay the amount allowed the relator by other

137; *State v. Governor*, 25 N. J. L. 331; *Hawkins v. Governor*, 1 Ark. 570.

<sup>1</sup> *Decatur v. Paulding*, 14 Pet. 497.

<sup>2</sup> *Reeside v. Walker*, 11 How. 272; *United States v. Black*, 128 U. S. 40; *United States v. Boutwell*, 3 MacArthur, 172; *Kendall v. United States*, 12 Pet. 524; *United States v. Guthrie*, 17 How. 284.

<sup>3</sup> *United States v. Raum*, 135 U. S.

200; *United States v. Lynch*, 137 U. S. 280.

<sup>4</sup> *Secretary v. McGarrahan*, 9 Wall. 298.

<sup>5</sup> *Decatur v. Paulding*, 14 Pet. 497.

<sup>6</sup> *Commissioner of Patents v. Whiteley*, 4 Wall. 522.

<sup>7</sup> *Brashear v. Mason*, 6 How. 92.

<sup>8</sup> *United States v. Black*, 128 U. S. 40.

departments in satisfaction of his claim,<sup>1</sup> and to compel the canceling of an entry of public land.<sup>2</sup> Where money is received by the secretary of state of the United States from a foreign nation under an agreement between the two nations, which money is in satisfaction of claims of its citizens against such nation, which are urged by the United States, a *mandamus* will not lie at the instance of the claimant to compel the secretary to pay such money to him, since in such matters by law the secretary acts in such manner as the president may direct, and he must be presumed to be acting under such directions.<sup>3</sup> Where money was paid to the secretary of state by a foreign government upon an award made in accordance with a treaty, in satisfaction of a private claim against such government, which money, by act of congress, the president, if he was of the opinion that the merits of such claim should be re-examined, was authorized to withhold from the claimant till such re-examination was had, or till congress otherwise ordered, a *mandamus* to compel the secretary of state to pay the money to the claimant was refused. So long as the political branch of the government had not lost its control over the subject-matter by final action, the claimant was not in a position, as between himself and his government, to insist on the conclusiveness of the award as to him. So long as the political department had not parted with its power over the money, the intervention of the judicial department could not be invoked.<sup>4</sup>

§ 101. Cases of *mandamus* to the heads of federal executive departments. — On the other hand, when the duty is merely ministerial, or if the officer refuses to act at all in the case of a duty involving discretion, the writ will issue to such head of an executive department of the federal government, in the one case to perform the act, and in the

<sup>1</sup> United States v. Boutwell, 3 MacArthur, 172.

<sup>2</sup> Gaines v. Thompson, 7 Wall. 347.

<sup>3</sup> United States v. Bayard, 15 Dist. Col. 370.

<sup>4</sup> United States v. Blaine, 139 U. S. 306.

other to proceed to consider the matter.<sup>1</sup> The writ has been issued: to compel the secretary of the interior to deliver a patent for land which had already been prepared, signed, sealed, countersigned and duly recorded;<sup>2</sup> to compel the postmaster-general to credit the account of a mail contractor with certain allowances, which had been properly determined, as provided by statute;<sup>3</sup> to compel the commissioner of patents to prepare and seal a patent and present it for signature to the secretary of the interior in a case of interference, when he had decided that the patent ought to issue, but withheld it on account of a reversal of his decision by the secretary of the interior, whereas, in law, no appeal was allowed to the secretary;<sup>4</sup> and to compel the commissioner of patents to give a copy of an abandoned or rejected application for a patent upon a reasonable suggestion of the necessity thereof for purposes of evidence.<sup>5</sup> It is maintained that, as a general rule, when a superior tribunal has rendered a decision binding on an inferior, it becomes the ministerial duty of the latter to obey and carry it out. So when a subordinate officer is overruled by a superior, his duty to obey such decision is a ministerial duty, which may be enforced by a *mandamus*.<sup>6</sup> When an application for an increase of pension was refused by the commissioner of pensions, but his decision was reversed by the secretary of the interior, a *mandamus* was issued to compel the commissioner to allow the increase.<sup>7</sup>

**§ 102. Mandamus to the secretaries of state of the various states.**—In the various states (except in Texas and

<sup>1</sup> United States v. Guthrie, 17 How. 284; Marbury v. Madison, 1 U. S. 378.

Cranch, 137; United States v. Raum, 135 U. S. 200; Carrick v. Pet. 524.

Lamar, 116 U. S. 423; Bayard v. United States, 127 U. S. 246; 50.

United States v. Black, 128 U. S. 40; Kendall v. United States, 12 Col. 14.

Pet. 524; United States v. Blaine, 139 U. S. 306; United States v. 200.

Windom, 137 U. S. 636.

<sup>7</sup> Miller v. Black, 128 U. S. 50.

Minnesota) it seems never to have been decided that all the acts of the head of a department in the discharge of the ordinary duties of his office are beyond the reach of a *mandamus*, but the decisions have been directed entirely to the nature of the act itself whose performance was sought. When an act to be done by the secretary of state is ministerial, the writ of *mandamus* is proper to compel its performance.<sup>1</sup> This writ has been issued: to compel the secretary of state to audit and allow an account against the state, and to draw a warrant therefor on the state treasurer;<sup>2</sup> to cause certain acts of the legislature to be published in certain papers for a certain period of time, as provided by the state constitution;<sup>3</sup> to furnish the relator with a copy of the laws for publication in a newspaper according to statute;<sup>4</sup> to attest and record the commission of an officer, which the governor had signed and sealed;<sup>5</sup> to compute the election returns filed with him, and to give a certificate thereof to the party having the highest number of votes;<sup>6</sup> to furnish a copy of the laws to the person who had the contract to print them;<sup>7</sup> to revoke the license of a foreign insurance company to do business in the state, for obtaining the removal of a suit against it to a federal court contrary to the agreement made by it when it procured its license;<sup>8</sup> to include in the notice of election an

<sup>1</sup> State v. Secretary of State, 33 Mo. 293; Free Press Ass'n v. Nichols, 45 Vt. 7; State v. Hayne, 8 Rich. (N. S.) 367; Black v. Auditor of State, 26 Ark. 237; People v. State Auditors (Board), 42 Mich. 422; State v. Warner, 55 Wis. 271; People v. Governor, 29 Mich. 320; Hawkins v. Governor, 1 Ark. 570.

<sup>2</sup> State v. Warner, 55 Wis. 271.

<sup>3</sup> State v. Mason (La., April 27, 1891), 9 South. R. 776. In an earlier case of a similar nature the writ was refused. The court then decided, without arguing the question, that the courts have no power

to promulgate laws or to make others publish them, and that redress was to be found in the legislative or executive departments. State v. Deslonde, 27 La. An. 71.

<sup>4</sup> State v. Harvey, 14 Wis. 151.

<sup>5</sup> Hawkins v. Governor, 1 Ark. 570; State v. Wrotnowski, 17 La. An. 156.

<sup>6</sup> Pacheco v. Beck, 52 Cal. 3; State v. Lawrence, 3 Kans. 95; State v. Rodman, 43 Mo. 256.

<sup>7</sup> State v. Barker, 4 Kans. 379.

<sup>8</sup> State v. Doyle, 40 Wis. 175; State v. Doyle, 40 Wis. 220.



officer omitted by him,<sup>1</sup> and to allow a party, authorized by the legislature, to complete certain indexing, and to allow his clerks access to, and the use of, his records for that purpose.<sup>2</sup>

§ 103. *Mandamus* to a state treasurer.—A *mandamus* lies to make a state treasurer pay warrants drawn on him by the proper officer,<sup>3</sup> provided he has funds in his hands appropriated by law to that purpose.<sup>4</sup> Unless the legislature has made the proper appropriation, the writ will not lie, because the state cannot be sued indirectly.<sup>5</sup> Even though there is an appropriation, but no funds are on hand, the writ will not be granted, with an order to pay the claim when he has funds, since that would give a preference.<sup>6</sup> The writ will not issue to compel the state treasurer to act in disobedience of the instructions of the legislature, since the legislature has supreme authority in such matters, and state officers cannot be required to act contrary to the orders of the state. The writ of *mandamus* will not lie: to compel the state treasurer to pay a warrant of the auditor, when the legislature has forbidden its issuance;<sup>7</sup> to compel the fund commissioners to pay state bonds in gold or silver, when the legislature has by joint resolution instructed that the payment shall be made in legal currency;<sup>8</sup> to pay warrants issued under a law by the governor, when he has been ordered by a resolution of the legislature not to pay them, which has been approved by the governor.<sup>9</sup> In order to compel obedience to a statute by the state treasurer, a *mandamus* has been issued ordering him: to issue certificates of indebtedness,<sup>10</sup> to issue state bonds to a railroad com-

<sup>1</sup> *People v. Carr*, 86 N. Y. 512.

<sup>2</sup> *Pinckney v. Henegan*, 2 Strob. 250.

<sup>3</sup> *Selma, etc. R. R., Ex parte*, 46 Ala. 423; *State v. Bordelou*, 6 La. An. 68; *State v. Hickman*, 10 Mont. 497.

<sup>4</sup> *Hommerich v. Hunter*, 14 La. An. 225.

<sup>5</sup> *Weston v. Dane*, 51 Me. 461.

<sup>6</sup> *State v. Dubuclet*, 26 La. An. 127. *Contra: People v. Sec. of State*, 58 Ill. 90.

<sup>7</sup> *Bayne v. Jenkins*, 66 N. C. 356.

<sup>8</sup> *State v. Hays*, 50 Mo. 84.

<sup>9</sup> *Fletcher v. Renfroe*, 56 Ga. 674.

<sup>10</sup> *State v. Cardozo*, 5 Rich. (N. S.) 297.

pany, which had complied with the law entitling it thereto,<sup>1</sup> and to stamp state bonds in the hands of private parties.<sup>2</sup> This writ has been issued to a state treasurer to compel him to surrender to a municipality its bonds issued in aid of a railroad company, but subsequently adjudged to be invalid;<sup>3</sup> in such case this proceeding is considered to be the only remedy which is admissible, because a sheriff with a writ of replevin should not be allowed to intermeddle with public papers.<sup>4</sup> When an application is made for a *mandamus* to compel the state treasurer to pay a claim audited and allowed by the secretary of state, the court can examine into the question of the legality of the claim, but, if it is legal, the decision of the secretary as to the amount thereof is conclusive.<sup>5</sup>

§ 104. *Mandamus to the comptroller of a state.*—As being a mere ministerial act a *mandamus* has been issued to the state comptroller: to audit the account of a member of the legislature;<sup>6</sup> to issue a warrant to relator for money due him under a contract relating to the state prison, when the contract specified the amount due each month and the legislature had appropriated the money therefor;<sup>7</sup> to draw a warrant for a judge's salary;<sup>8</sup> to allow the district attorney to inspect and copy his records, relating to the returns made to him concerning the proceeds of assessments, it being the district attorney's duty to bring suit for delinquent taxes;<sup>9</sup> and to issue his warrant to the paymaster of a regiment for the sum allowed by law to each company, when the facts are admitted and the only question involved is one of law.<sup>10</sup> If the comptroller believes the party is not an officer *de jure*, he may refuse to issue his warrant for

<sup>1</sup> Northwestern, etc. R. R. v. Jenkins, 65 N. C. 173.

<sup>2</sup> State v. Burke, 33 La. An. 969.

<sup>3</sup> People v. Treasurer, 23 Mich. 499; People v. State Treasurer, 24 Mich. 468.

<sup>4</sup> People v. State Treasurer, 24 Mich. 468.

<sup>5</sup> State v. Hastings, 10 Wis. 518.

<sup>6</sup> Fowler v. Pierce, 2 Cal. 165.

<sup>7</sup> McCauley v. Brooks, 16 Cal. 11.

<sup>8</sup> Turner v. Melony, 13 Cal. 621.

<sup>9</sup> State v. Hobart, 12 Nev. 408.

<sup>10</sup> State v. Anderson, 52 N. J. L.

such officer's salary, and wait for the decision of the court in a *mandamus* proceeding.<sup>1</sup> An answer that such person is ineligible to the office, when he has been inducted into office and has a commission therefor, is invalid, since in this proceeding the title to an office cannot be tried.<sup>2</sup> When the comptroller-general is requested to levy a tax to pay the interest on the public debt, if he has a reasonable doubt as to the existence of a fact, upon which the duty of performance depends, he may make the party prove such fact in a proper judicial proceeding, as in *mandamus*.<sup>3</sup> The comptroller must be specifically and specially authorized by law to perform the duty whose enforcement is sought. When the law so provided, he was ordered to draw his warrant in payment of an officer's salary,<sup>4</sup> and to pay for supplies furnished to the state.<sup>5</sup> He was not required to draw his warrant to pay the salary of the salt commissioner, because the law did not specifically and specially make it his duty to do so.<sup>6</sup> When the statute fixes the salary of an officer and directs that it be paid out of the state treasury, it is not necessary that there should be an annual appropriation therefor, and the comptroller will be required to issue his warrant to pay it.<sup>7</sup> In any matter where the comptroller is authorized to exercise his judgment and discretion, the writ of *mandamus* will of course not lie; as to correct an error in a tax duplicate;<sup>8</sup> or to adjust and settle public accounts, when he is given exclusive power in the premises.<sup>9</sup>

§ 105. **Mandamus to the auditor of a state.**—The writ of *mandamus* also lies to compel a state auditor to perform a mere ministerial act.<sup>10</sup> The law having prescribed the duty,

<sup>1</sup> State v. Gamble, 13 Fla. 9.

<sup>2</sup> Turner v. Melony, 13 Cal. 621.

<sup>3</sup> Morton v. Comptroller-General,

4 Rich. (N. S.) 430.

<sup>4</sup> Humbert v. Dunn, 84 Cal. 57.

<sup>5</sup> Proll v. Dunn, 80 Cal. 220.

<sup>6</sup> Chisholm v. McGehee, 41 Ala. 192.

<sup>7</sup> Nichols v. Comptroller, 4 Stew. & Port. 154; Gilbert v. Moody

(Idaho, Feb., 1891), 25 Pac. Rep. 1092; State v. Hickman, 10 Mont. 497.

<sup>8</sup> Lynch, Ex parte, 16 S. C. 32.

<sup>9</sup> Green v. Purnell, 12 Md. 329; Towle v. State, 3 Fla. 202.

<sup>10</sup> State v. Warner, 55 Wis. 271; Free Press Assoc. v. Nichols, 45 Vt. 7.

this writ has been issued to a state auditor to compel him : to draw a warrant for the salary of an officer, when the amount thereof was fixed by law ;<sup>1</sup> to transfer and fund certain state bonds ;<sup>2</sup> to issue his warrant for \$2,500 in favor of a military command ;<sup>3</sup> to publish the semi-annual statement of foreign insurance companies doing business in the state in two daily papers having the largest circulation, but leaving with him the selection ;<sup>4</sup> to advertise for bids for the public printing ;<sup>5</sup> to issue his warrant for the amount due for property received by the state on a contract made with it ;<sup>6</sup> to issue notes of circulation to a bank which had properly organized and applied for them ;<sup>7</sup> and to draw a warrant for interest on state bonds, though the wrong party had already been paid the interest on the same bonds.<sup>8</sup> Where, however, the auditor is in doubt about the legality of issuing his warrant to the applicant, he may refuse sometimes to issue it, out of abundant caution and in order to obtain the opinion of the court.<sup>9</sup> When the law has appointed another officer or tribunal to examine and certify a claim, the auditor's duty in drawing the warrant therefor is purely ministerial.<sup>10</sup> A recorder of brands and marks was authorized by law to have certain lists printed at the public expense ; this implied a right to make a contract and fix the price ; the auditor was held to have no discretion, and was required to issue his warrant for the amount fixed by the contract.<sup>11</sup> When the claim must be established before the auditor himself, he will not be required to draw a warrant

<sup>1</sup> *Black v. Auditor*, 26 Ark. 237 ;  
*Bryan v. Cattell*, 15 Iowa, 538 ; *State v. Clinton*, 28 La. An. 47 ; *Fowler v. Pierce*, 2 Cal. 165 ; *Swan v. Buck*, 40 Miss. 268 ; *Reynolds v. Taylor*, 43 Ala. 420.

<sup>2</sup> *Robinson v. Rogers*, 24 Grat. 319.

<sup>3</sup> *State v. Bordelon*, 6 La. An. 68.

<sup>4</sup> *Holliday v. Henderson*, 67 Ind. 103.

<sup>5</sup> *People v. Auditors (State)*, 42 Mich. 422.

<sup>6</sup> *People v. Secretary of State*, 58 Ill. 90.

<sup>7</sup> *Citizens' Bank v. Wright*, 6 Ohio St. 318.

<sup>8</sup> *State v. Smith*, 43 Ill. 219.

<sup>9</sup> *Bryan v. Cattell*, 15 Iowa, 538.

<sup>10</sup> *Lindsey v. Auditor of Ky.*, 3 Bush, 231 ; *Danley v. Whiteley*, 14 Ark. 687.

<sup>11</sup> *Fisk v. Cuthbert*, 2 Mont. 593.

for its payment, unless it is shown that the claim has been properly established before him.<sup>1</sup> There must, however, be an appropriation by the legislature to cover such claims, before the auditor can be required to issue a warrant on the state treasury for their payment.<sup>2</sup> The auditor may also show, in justification of his refusal to issue his warrant, that the appropriation is exhausted, or that the claim exceeds the revenue of the year from which it is exigible.<sup>3</sup> When the money to pay that claim has been appropriated by the legislature and the amount thereof has been ascertained in the manner prescribed by law, a *mandamus* will lie to compel the state auditor to issue a warrant on the state treasury for its payment.<sup>4</sup> The fact that there is no money at the time does not concern the auditor and does not prevent the issuance of the writ.<sup>5</sup> The writ will not lie to establish in this mode unliquidated claims against the state. In such cases relief must be sought at the hands of the legislature.<sup>6</sup> Where, however, the power is given to an auditor to settle claims against the state, an account settled and certified by one auditor cannot be altered by his successor, and any corrections made by him are merely void, and a writ of *mandamus* will not issue to compel him to strike them out.<sup>7</sup> It sometimes occurs that an application is made to the auditor to pay the salary or settle the account of an officer whose title to his office is in dispute. In such cases the auditor must recognize the title of the person who holds the commission,<sup>8</sup> and is also the *de facto* officer.<sup>9</sup> When

<sup>1</sup> Swann v. Work, 24 Miss. 439.

<sup>2</sup> State v. Jumel, 31 La. An. 142; State v. Kenney, 9 Mont. 389; Carr v. State, 127 Ind. 204; State v. Holaday, 65 Mo. 76; Evans v. McCarthy, 42 Kans. 426.

<sup>3</sup> State v. Jumel, 30 La. An. 339.

<sup>4</sup> Rice v. State, 95 Ind. 33; State v. Kenney, 9 Mont. 223; Swan v. Buck, 40 Miss. 268.

<sup>5</sup> State v. Clinton, 28 La. An. 47; Evans v. McCarthy, 42 Kans. 426.

See § 126. *Contra*: People v. Tremain, 29 Barb. 96; Gilbert v. Moody (Idaho, Feb., 1891), 25 Pac. Rep. 1092.

<sup>6</sup> Swan v. Buck, 40 Miss. 268; Rice v. State, 95 Ind. 33.

<sup>7</sup> State v. Brewer, 61 Ala. 318.

<sup>8</sup> State v. Moseley, 34 Mo. 375; Winston v. Moseley, 35 Mo. 146; State v. Clark, 52 Mo. 508.

<sup>9</sup> State v. Draper, 48 Mo. 213.

such difficulty occurs relative to a membership of the legislature, and the legislature itself has failed to act in the matter, the auditor must recognize the person who holds the certificate of election issued by the legally instituted canvassing board of the election.<sup>1</sup> Since the auditor can only be required to perform a duty imposed upon him by law, he cannot be required to issue his warrant, if the legislature has altered the law so that it is no longer his duty to do so. Whether the state has by its legislation impaired the obligations of its contract with the relator cannot be inquired into in a *mandamus* proceeding wherein the state is not a party, since the auditor has no interest in that question.<sup>2</sup> When the duty imposed on the auditor involves judgment and discretion, as whether a foreign insurance company should have a license to do business in the state, the writ will issue only in a case of clear and wilful disregard of duty.<sup>3</sup>

**§ 106. Mandamus to commissioner of state land office.—**

A writ of *mandamus* will lie to the commissioner of the state land office, when nothing remains to be done but the enforcement of a legal duty,<sup>4</sup> as to issue patents to a company for lands selected for it as provided by law,<sup>5</sup> or to issue patent certificates for swamp land.<sup>6</sup> It should be remembered that Minnesota and Texas, but apparently no other state, refuse to issue this writ to the chief officer of any executive department of the state,<sup>7</sup> though it is admitted that in the latter state it has been issued to the commissioner of the general land office; but this has occurred only in reference to patents for land, and is claimed to be an exception to the rule.<sup>8</sup>

<sup>1</sup> State v. Kenney, 9 Mont. 389.

<sup>6</sup> Hempstead v. Underhill, 20 Ark.

<sup>2</sup> State v. Clinton, 27 La. An. 429. 337.

<sup>3</sup> State v. Benton, 25 Neb. 834;  
Western H. I. Co. v. Wilder, 40  
Kans. 561.

<sup>7</sup> State v. Whitcomb, 28 Minn. 50;  
Chalk v. Darden, 47 Tex. 438.

<sup>4</sup> Webster v. Newell, 66 Mich. 503.

<sup>8</sup> Galveston, etc. R. R. v. Gross,  
47 Tex. 428.

<sup>5</sup> People v. Com'r S. Land Off., 23  
Mich. 270.

## CHAPTER 9.

### MANDAMUS TO THE LEGISLATIVE DEPARTMENT.

§ 107. The legislative department is one of the three co-ordinate branches of the government, and all the arguments advanced concerning the coercion of one department by another, already referred to in the discussion concerning the issuance of a *mandamus* against the governor, are applicable here. Very few cases are to be found in the reports where the courts have been called upon to interfere in legislative matters. The law required the speaker of the legislature to certify to the comptroller the compensation due to a member of the legislature, and a writ of *mandamus* was allowed to compel him to do so.<sup>1</sup> The law specified that the election or appointment of all officers, elected or appointed by the legislature should be certified by the speakers of both houses thereof, and they were compelled so to do.<sup>2</sup> The law required the legislature, assembled in joint session, to open and publish the returns of the election of the executive state officers. The speaker of the house, to whom such returns had been sent sealed and unopened, refused to open and publish them, claiming that contests had been commenced relative to the election of some of those officers; that evidence had been taken in the contests, and that such contests must be first heard and determined. The court considered the duty of the speaker in the premises to be merely ministerial, and that the allowance of the claim of the speaker, that the other two state departments were independent of any control by the judiciary, would be attended with most disastrous results; that the elected officers would have no remedy, if the

<sup>1</sup> Pickett, Ex parte, 24 Ala. 91.

<sup>2</sup> State v. Moffitt, 5 Ohio, 358.

proper tribunal would not canvass the returns nor certify the result; that elections would become uncertain in result, and doubly so as to the result declared, and that the payment of the state's indebtedness, even after legislative appropriation, would be absolutely dependent upon the vacillating will of approving and disbursing officers. The speaker was ordered to open and publish the returns.<sup>1</sup> A *mandamus* was applied for to compel the speaker of the house of representatives to send a certain bill to the senate, which, it was claimed, had passed the house. The speaker had decided that the bill had not passed, and the house had sustained him on appeal. The court stated that the writ lies only for the performance of a ministerial duty, but held that in this matter the house had exclusive jurisdiction, and the writ was refused.<sup>2</sup> When there is a dispute as to which of two persons has been elected to the legislature, the courts will not consider the question, if it is shown that a contest relative thereto is pending in that body. If no contest is pending, and the court is called upon to enforce collateral and incidental rights belonging to a member of the legislature, as to compel the state auditor to audit and settle his accounts, it will accept the certificate of election, issued by the legally constituted canvassing board, as decisive of the question of membership.<sup>3</sup> The clerks of the respective houses of a territorial legislature were required by law to file the minutes of their proceedings with the secretary of the territory. The speaker of one of the legislative bodies claimed that the minutes so filed contained, besides the proper records, the proceedings of two illegal bodies, which professed to be the legislature, and that such proceedings took place after the legal period for the session of the legislature had expired, and after the legislature had adjourned *sine die*. He sought to have the court take the minutes as filed in its control, cause them to be corrected, and then to be refiled with the secretary of

<sup>1</sup>State v. Elder (Neb., Jan. 14, 1891), 47 N. W. Rep. 710.

<sup>2</sup>Echols, Ex parte, 39 Ala. 698.

<sup>3</sup>State v. Kenney, 9 Mont. 389.



the territory as the only true minutes, and to order the improper minutes to be expunged. The court said that one branch of government could not encroach on the domain of another, and that it was not the function of a court to make up the records of the proceedings of legislative bodies.<sup>1</sup> For the reasons just given the secretary of a territory was not required to record a report made by the president of the council of the territorial legislature as a part of the proceedings of the council, nor to expunge from the records a part of the report of the proceedings of the council made by its clerk.<sup>2</sup> Where by *mandamus* it was sought to compel the secretary of state to deliver the returns of the election to the speaker of the house of representatives to be laid before that body, and the return of the secretary of state stated that he had delivered the returns to the speaker of the house, who was another person, presiding over another body, the court determined which body was the legal house of representatives, and that a *mandamus* was proper for the purpose desired.<sup>3</sup>

<sup>1</sup> *Burkhart v. Reed* (Idaho, March 11, 1889), 22 Pac. Rep. 8. Affirmed 11, 1889), 22 Pac. Rep. 1. This case was affirmed on appeal, 134 U. S. 361.

<sup>3</sup> *State v. Hayne*, 8 Rich. (N. S.) 367.

<sup>2</sup> *Clough v. Curtis* (Idaho, March

## CHAPTER 10.

### MANDAMUS TO PUBLIC OFFICERS AND PUBLIC CORPORATIONS.

- § 108. A *mandamus* lies to all public officers and public corporations to perform any ministerial duty.
- 109. When suits do not accomplish the act desired, a *mandamus* lies — Illustrations.
- 110. *Mandamus* not issue when officers have a discretion as to the manner or matter of doing the act.
- 111. *Mandamus* to the governing board of a county.
- 112. Acts of county authorities, involving judgment and discretion.
- 113. *Mandamus* to city councils.
- 114. *Mandamus* to officers of taxes.
- 115. *Mandamus* relative to public schools.
- 116. *Mandamus* to enforce duties relative to the public roads.
- 117. *Mandamus* relative to letting public contracts.
- 118. *Mandamus* relative to the approval of bonds of officers.
- 119. *Mandamus* about issuing licenses.
- 120. *Mandamus* to police officials.
- 121. *Mandamus* to clerk of the county board.
- 122. *Mandamus* to the clerk of a court.
- 123. *Mandamus* to a sheriff.
- 124. *Mandamus* to a register of deeds.
- 125. *Mandamus* to keep public offices in the proper places.
- 126. *Mandamus* to auditing officers.
- 127. *Mandamus* to assessors of taxes.
- 128. *Mandamus* relative to subscriptions by municipal corporations to railroads, etc.
- 129. *Mandamus* to levy a tax to pay debts, when authority to make a levy is granted or is implied.
- 130. Claims must be legally established before a *mandamus* will issue to compel the levy of a tax for their payment.
- 131. In a *mandamus* on a judgment, is the latter conclusive?
- 132. In a *mandamus* to levy a tax to pay a demand, public necessities must be first considered.
- 133. *Mandamus* to collectors of revenue.
- 134. *Mandamus* to obtain possession of public funds.
- 135. *Mandamus* to disbursing officers.
- 136. *Mandamus* concerning the payment of salaries.

**§ 108. A mandamus lies to all public officers and public corporations to perform any ministerial duty.**—As already stated, the writ of *mandamus* will issue to public officers, public boards and public corporations, and all others exercising public authority, to compel the performance of such official acts as clearly pertain to their duty and are of absolute obligation.<sup>1</sup> The duties referred to must call for no discretion or exercise of official judgment.<sup>2</sup> Whether a duty is merely ministerial, or calls for the exercise of discretion or judgment, is a matter for the courts to decide; and since the range of duties is almost infinite, and the discretion granted in each case depends upon the local law, the decisions of the courts cannot be expected to be in harmony. We will call attention to a number of cases, involving a variety of questions, which will illustrate the nature of the subjects and duties on account of which this writ has been invoked. Since the principles and application thereof are the same, whether the writ be sought against a public officer or a public board or a public corporation, and the writ in the two latter cases being often issued against the individuals by name, who compose the public board or the part of the public corporation charged with the performance of the duty sought, we will make no distinction between them relative to the duties on account of which the writ of *mandamus* has been applied for. The legality of the incorporation of a public corporation cannot be questioned in a *mandamus* proceeding.<sup>3</sup>

**§ 109. When suits do not accomplish the act desired, a mandamus lies — Illustrations.**—Though corporations and ministerial officers are liable to be sued for neglect of duty, yet the writ of *mandamus* will go to compel a proper execution of their duties, such suits not accomplishing the

<sup>1</sup> *Arberry v. Beavers*, 6 Tex. 457; *People v. Inspector State Prison*, 4 Mich. 187; *People v. State Treasurer*, 24 Mich. 468; *Runion v. Latimer*, 6 S. C. 126.

<sup>2</sup> *Willeford v. State*, 43 Ark. 62.

<sup>3</sup> *People v. Schools (Board Trustees)*, 111 Ill. 171; *Hon v. State*, 89 Ind. 249.

object desired — the fulfillment of the duty.<sup>1</sup> The writ has been issued to the mayor of a city: to sign an order for the payment of a claim against the city;<sup>2</sup> to sign a contract made in pursuance of the charter and ordinances of the city;<sup>3</sup> to countersign a warrant of the comptroller to pay money as ordered by the board of supervisors;<sup>4</sup> and to issue and sell city bonds and to pay into court the adjudged value of lands condemned for wharf purposes.<sup>5</sup> The writ has been issued: to compel an officer to prepare and sign the bonds of a municipality for lands purchased by it, as directed by law;<sup>6</sup> to compel the canal appraisers, on appeal from them, to make return of their proceedings to the canal board;<sup>7</sup> to compel a probate judge to issue his warrant to the sheriff or some suitable person to return to his township a patient discharged from the insane asylum;<sup>8</sup> to compel the commissary to admit a party as the deputy of the register of the court of the archbishop of York;<sup>9</sup> to compel officers to keep their public books in a certain way in accordance with the statute;<sup>10</sup> to compel the steward, who keeps the corporate books, to produce them at the corporate meeting to enter therein the elections of their members;<sup>11</sup> to compel a municipal officer to submit his books of account to the officers authorized to inspect them;<sup>12</sup> to compel the proper officer to put the corporate seal to the certificate of election of its recorder;<sup>13</sup> to make the keeper of the rolls furnish the superintendent of public printing with the manuscript of all bills passed,<sup>14</sup> and to

<sup>1</sup> *State v. Wilson*, 17 Wis. 687;  
*McCullough v. Brooklyn (Mayor)*,  
 23 Wend. 458; *People v. Mead*, 24  
 N. Y. 114.

<sup>2</sup> *State v. Ames*, 31 Minn. 440.

<sup>3</sup> *State v. Ricord*, 35 N. J. L. 396.

<sup>4</sup> *People v. Opdyke*, 40 Barb. 306.

<sup>5</sup> *Duncan v. Louisville (City)*, 8  
 Bush, 98.

<sup>6</sup> *People v. Brennan*, 39 Barb. 522.

<sup>7</sup> *People v. Canal Appraisers*, 73  
 N. Y. 443.

<sup>8</sup> *State v. Burgoyne*, 7 Ohio St.  
 153.

<sup>9</sup> *Rex v. Ward*, 2 Str. 893.

<sup>10</sup> *State v. Eberhardt*, 14 Neb. 201.

<sup>11</sup> *Calne (Borough), Case of*, 2 Stra.  
 948.

<sup>12</sup> *Keokuk (City) v. Merriam*, 44  
 Iowa, 432.

<sup>13</sup> *King v. York (Mayor)*, 4 T. R.  
 699.

<sup>14</sup> *Wolfe v. McCaull*, 76 Va. 876.

compel him to strike from the rolls any act which the court decides is not law;<sup>1</sup> to compel a constable to receive county warrants in payment of fines, as provided by law;<sup>2</sup> to compel a subordinate officer to obey the decision of a superior officer who has appellate jurisdiction over him;<sup>3</sup> to compel a county judge to appoint appraisers to assess the damages for condemning a right of way;<sup>4</sup> to compel a board of trustees, who appointed the appraisers to assess the damages for the appropriation of land, to certify the proceedings upon appeal to the circuit court;<sup>5</sup> and to compel the clerk of the court to file certain resolutions of the various school boards making a city one school district.<sup>6</sup> When a *mandamus* is sought to compel a city to remove an obstruction from an alley, which was placed there by a railroad company with the consent of the city, it must be affirmatively shown that an unlawful use is being made of the alley.<sup>7</sup>

**§ 110. Mandamus not issued when officers have a discretion as to the manner or matter of doing the act.**—Where, however, the law allows a discretion as to the manner or matter of doing a certain act, a *mandamus* will not issue to compel its performance. On the ground that a discretion was allowed in the matter, a writ of *mandamus* has been refused: to compel the board of liquidators to sell state bonds in order to bond the floating state debt;<sup>8</sup> to compel the issuance of patents for donation lands to particular state soldiers;<sup>9</sup> to compel the state board to let the contract for public printing, when the board is allowed to award it only to responsible persons or to those who file a

<sup>1</sup> Wise v. Bigger, 79 Va. 269.

<sup>2</sup> Lusk v. Perkins, 48 Ark. 238.

<sup>3</sup> United States v. Raum, 135 U. S. 200; United States v. Black, 128 U. S. 50.

<sup>4</sup> Illinois C. R. R. v. Rucker, 14 Ill. 353.

<sup>5</sup> Wabash, etc. Canal (Trustees) v. Johnson, 2 Ind. 219.

<sup>6</sup> Com. v. James, 135 Pa. St. 480.

<sup>7</sup> State v. New Albany (City), 127 Ind. 221.

<sup>8</sup> State v. Warmoth, 23 La. An. 76.

<sup>9</sup> Com. v. Cochran, 6 Binn. 456.

satisfactory bond;<sup>1</sup> to compel the commissioners of a bankrupt to give a certificate of conformity;<sup>2</sup> to compel the election of managers of an alms-house so as to leave three of the old managers;<sup>3</sup> to compel the mayor and capital burgesses to remove a capital burgess for non-residence;<sup>4</sup> to review the action of a city in refusing to cause an improvement of a street to be made, and to be paid for out of the general funds;<sup>5</sup> to compel the justices to nominate a particular justice as one of the three to be nominated to the governor, out of whom he selects a sheriff;<sup>6</sup> or to compel the mayor to execute leases for coal lands of the Girard estate to certain persons, who had been accepted as suitable by the superintendent of those lands under the supervision of the committee of the council.<sup>7</sup>

§ 111. **Mandamus to the governing board of a county.** The writ of *mandamus* lies to compel the tribunal or body which manages the affairs of a county to discharge its duties, but the writ can only require the performance of acts which such body is authorized by law to perform.<sup>8</sup> When the county commissioners without authority of law employed an attorney, a *mandamus* to compel them to pay him out of the county treasury was refused.<sup>9</sup> The county supervisors had no jurisdiction to compel towns to pay money in compensation for wrongful acts of town officers, and a *mandamus* was refused to compel them to audit and allow such a claim and to direct it to be levied on the town or county.<sup>10</sup> On the other hand, as being within the range of their ministerial duties, the county authorities have been compelled by this writ: to accept the lowest bid received

<sup>1</sup> State v. Robinson, 1 Kans. 188.

<sup>6</sup> Frisbie v. Wythe Co. (Just.), 2

<sup>2</sup> Republica v. Clarkson, 1 Yeates, 46.

Va. Cas. 92.

<sup>7</sup> Com. v. Henry, 49 Pa. St. 530.

<sup>3</sup> Republica v. Guardians of Poor, 1 Yeates, 476.

<sup>8</sup> Bass v. Taft, 137 U. S. 458.

<sup>4</sup> King v. West Looe (Mayor), 5 Dow. & R. 414.

<sup>9</sup> State v. Franklin Co. (Com'rs), 21 Ohio St. 648.

<sup>5</sup> Michigan City (Mayor) v. Roberts, 34 Ind. 471.

<sup>10</sup> People v. Chenango Co. (Sup'rs), 11 N. Y. 563.

for the sale of town warrants;<sup>1</sup> to reconvene and declare a resolution carried and to so record the fact, after the resolution had been declared to be defeated and the record so made up, through a misunderstanding of the requirements of the law;<sup>2</sup> to accept and approve a sheriff's bond, which, they claimed erroneously, was offered too late;<sup>3</sup> to correct an erroneous assessment and to refund the money paid, under an order of court so recommending to them;<sup>4</sup> to apportion a debt upon the taxable property of the county;<sup>5</sup> to make a highway on the failure of a town to do so within a certain time;<sup>6</sup> to lay off and sell lots at the new county seat;<sup>7</sup> to appropriate a certain sum for the construction of a bridge, the law relative thereto having been fully complied with;<sup>8</sup> to refund the amount of a fine which was paid to avoid imprisonment, after the judgment imposing the fine had been reversed on appeal;<sup>9</sup> to admit to record a deed of emancipation of slaves,<sup>10</sup> and to certify that such slaves, who were then before them, were of sound mind and body and between certain ages as appeared to them;<sup>11</sup> to divide a township after the requirements of the statute were complied with and the proper petition was presented;<sup>12</sup> to set apart certain funds in their treasury for a specific purpose as required by law;<sup>13</sup> to issue warrants, when vacancies occur in township offices, to the municipal officers of the town to fill such vacancies;<sup>14</sup> to audit the accounts against the county, incurred by its clerk, and to issue its warrant therefor;<sup>15</sup> and to admit the report of the surveyor relative to

<sup>1</sup> *Mau v. Liddle*, 15 Nev. 271.

<sup>2</sup> *People v. Brinkerhoff*, 68 N. Y. 259.

<sup>3</sup> *State v. Lewis*, 10 Ohio St. 128.

<sup>4</sup> *People v. Ulster Co. (Sup'rs)*, 65 N. Y. 300.

<sup>5</sup> *People v. Jackson Co. (Sup'rs)*, 24 Mich. 237.

<sup>6</sup> *Richards v. Bristol (Com'rs)*, 120 Mass. 401.

<sup>7</sup> *State v. McMillan*, 8 Jones, 174.

<sup>8</sup> *Supervisors (Board) v. People*, 24 Ill. Ap. 410.

<sup>9</sup> *People v. Wayne Co. (Board Aud.)*, 41 Mich. 223.

<sup>10</sup> *Manns v. Givens*, 7 Leigh, 689.

<sup>11</sup> *Dawson v. Thruston*, 2 Hen. & M. 132.

<sup>12</sup> *Henry v. Taylor*, 57 Iowa, 72.

<sup>13</sup> *Humboldt Co. v. Churchill Co.*, 6 Nev. 30.

<sup>14</sup> *Rose v. Co. Com'rs*, 50 Me. 243.

<sup>15</sup> *Boone Co. v. Todd*, 3 Mo. 140.

land sold for taxes.<sup>1</sup> Since this writ lies to compel officers, possessing discretionary or judicial power, to consider and pass on questions submitted to them, it has been issued to the county authorities: to pass on and to audit claims against the county presented to them for allowance;<sup>2</sup> to order the plat of a survey of land sold for taxes and not redeemed, and the certificate of the surveyor thereto, to be recorded, if they find it to be correct;<sup>3</sup> to determine the amount due to the sheriff for collecting the taxes;<sup>4</sup> to fix the rate for the use of water;<sup>5</sup> when land has been assessed in two townships, to determine what taxes are to be refunded and by what township;<sup>6</sup> to equalize an assessment, made because a prior assessment had omitted certain property;<sup>7</sup> to compel them to summon a jury to assess the damages incurred by the appropriation of land for a railroad;<sup>8</sup> to furnish road overseers with necessary implements to put roads in proper condition;<sup>9</sup> to hear and adjust a sheriff's claim for fees, which they had refused to do, unless he would release all errors in a judgment then pending on appeal which the county had obtained against him, which he had declined to do;<sup>10</sup> to settle a claim against the county, and to levy a tax to pay it;<sup>11</sup> and to hear and determine whether certain taxes have been illegally assessed by the towns and paid, and to cause them to be repaid by the towns, if so illegally assessed and paid.<sup>12</sup> By this writ the county authorities have been compelled: to build a bridge according

<sup>1</sup> *Randolph v. Stalnaker*, 13 Grat. 523.

<sup>2</sup> *State v. Hamilton Co. (Com'rs)*, 26 Ohio St. 364; *People v. Delaware Co. (Sup'rs)*, 45 N. Y. 196; *Brady v. New York (Sup'rs)*, 2 Sandf. 460.

<sup>3</sup> *Delaney v. Goddin*, 12 Grat. 266.

<sup>4</sup> *Koonce v. Jones Co. (Com'rs)*, 106 N. C. 192.

<sup>5</sup> *Spring Valley W. Co. v. Supervisors (Board)*, 61 Cal. 18.

<sup>6</sup> *People v. Essex Co. (Sup'rs)*, 70 N. Y. 228.

<sup>7</sup> *Virginia, etc. R. R. v. Ormsby Co. (Com'rs)*, 5 Nev. 341.

<sup>8</sup> *Carpenter v. Bristol Co. (Com'rs)*, 21 Pick. 258.

<sup>9</sup> *Monroe Co. (Sup'rs) v. State*, 63 Miss. 135.

<sup>10</sup> *Taylor, Ex parte*, 5 Ark. 49.

<sup>11</sup> *Madison Co. Court v. Alexander, Walker*, 523.

<sup>12</sup> *People v. Otsego Co. (Sup'rs)*, 53 Barb. 564; *People v. Herkimer Co. (Sup'rs)*, 56 Barb. 452.



to an act of the legislature;<sup>1</sup> to provide a house of refuge distinct from the common jail;<sup>2</sup> to complete the county building as required by law;<sup>3</sup> to build a jail — but they were allowed their discretion as to the kind, size and cost of the jail, and the quality of the materials used.<sup>4</sup> The county authorities cannot be compelled to erect county buildings when the law leaves that matter to their discretion.<sup>5</sup> When the county authorities are required to provide a court-room, a jail, etc., they discharge their duty by supplying such accommodations, though the buildings were not erected for those purposes.<sup>6</sup> If they have a discretion as to when they will erect public buildings, they may stop the construction thereof, and cannot be compelled by *mandamus* to allow such construction to proceed; the contractor, who is the party most interested, can sue the county on his contract.<sup>7</sup> County authorities have been compelled by *mandamus* to subscribe in the name of the county for railroad stock, as authorized by popular vote,<sup>8</sup> and to the amount of money collected on a tax voted for that purpose;<sup>9</sup> they have also been required to issue county bonds to a railroad,<sup>10</sup> and to a contractor for the construction of a road in accordance with the provisions of an act of the legislature, after due acceptance of the road.<sup>11</sup> When a county court refuses to allow a claim against a county, a *mandamus* will not lie, since there is a remedy by a suit against the county.<sup>12</sup> When the county board is called upon to act judicially, as on an application to abate the taxes of an

<sup>1</sup> Com. v. Fairfax Co. (Just.), 2 Va. Cas. 9; Com. v. Kanawha Co. (Just.), 2 Va. Cas. 499.

<sup>2</sup> Com. v. Hampden (Sessions), 2 Pick. 414.

<sup>3</sup> State v. Perry Co. (Com'rs), 5 Ohio St. 497.

<sup>4</sup> People v. La Salle Co. (Sup'rs) 84 Ill. 303.

<sup>5</sup> State v. Howell Co. Court, 58 Mo. 583.

<sup>6</sup> Black, Ex parte, 1 Ohio St. 30.

<sup>7</sup> Black, Ex parte, 1 Ohio St. 30.

<sup>8</sup> Selma, etc. R. R., Ex parte, 45 Ala. 696.

<sup>9</sup> Pfister v. State, 82 Ind. 382.

<sup>10</sup> Smith v. Bourbon Co., 127 U. S. 105; People v. Ohio Grove Town., 51 Ill. 191.

<sup>11</sup> Noble Co. (Com'rs) v. Hunt, 33 Ohio St. 169.

<sup>12</sup> Crandall v. Amador Co., 20 Cal. 72; State v. Floyd Co. (Judge), 5 Iowa, 380; Portwood v. Montgom-

individual,<sup>1</sup> the writ of *mandamus* will not lie. An assignee of a part of a debt due from the county was refused a *mandamus* on the board of supervisors to issue him a warrant, because he did not sustain such a relation to the respondents as to entitle him to such remedies.<sup>2</sup> A *mandamus* to the county commissioners to enter judgment on a claim presented to them for services as county auditor was refused, because the case was then in the circuit court on appeal.<sup>3</sup> When the notice to the voters of a township relative to voting on the question of issuing bonds to be used in improving the township roads did not comply with the law, a *mandamus* was refused to compel the county supervisors to issue bonds, in accordance with the request of the majority of the voters, as evidenced by the vote, to be paid by taxation levied on the township.<sup>4</sup>

**§ 112. Acts of county authorities, involving judgment and discretion.**—In a matter wherein the county board has taken action and exercised its discretion and judgment, in accordance with the general rule its decision cannot be reviewed by the writ of *mandamus*. The writ has been refused: to review its decision in granting a license for a ferry where there were two applicants;<sup>5</sup> in determining the compensation due to a constable for conveying a pauper from one town to another;<sup>6</sup> in appointing collectors of taxes, after rejecting the persons returned by the assessors;<sup>7</sup> in deciding whether five hundred qualified voters had joined in a petition to them to order an election;<sup>8</sup> in dismissing a petition to them, for an increase of damages for land condemned, for want of prosecution;<sup>9</sup> and in dismissing a peti-

ery Co. (Sup'rs), 52 Miss. 523; United States v. Buchanan Co., 5 Dil. 285.

<sup>1</sup> Gibbs v. Hampden Co. (Com'rs), 19 Pick. 298.

<sup>2</sup> Foote v. Noxubee Co. (Sup'rs), 67 Miss. 156.

<sup>3</sup> Lagrange Co. (Com'rs) v. Cutler, 7 Ind. 6.

<sup>4</sup> McMahon v. San Mateo Co. (Sup'rs), 46 Cal. 214.

<sup>5</sup> Oxford Ferry Co. v. Sumner Co. (Com'rs), 19 Kans. 293.

<sup>6</sup> People v. Albany (Sup'rs), 12 Johns. 414.

<sup>7</sup> Com. v. Perkins, 7 Pa. St. 42.

<sup>8</sup> State v. Eureka Co. (Com'rs), 8 Nev. 309.

<sup>9</sup> Davis v. County Com'rs, 63 Me.

tion for an order for an election to relocate the county seat, when the board had struck off of the petition some of the names and had then rejected it for not being signed by enough petitioners.<sup>1</sup>

§ 113. **Mandamus to city councils.**— This writ issues to the legislative branches of municipal corporations to compel the performance of ministerial duties imposed on them. It has been issued to the common council of a city: to pass an ordinance, as required by legislative act, to create a public fund for the erection of a market;<sup>2</sup> to open a certain street laid out by them;<sup>3</sup> to consider and act upon the nominations submitted by the mayor for their approval under an act to establish a board of public works;<sup>4</sup> to approve a plat of land laid out in a city when the owner had fully complied with the law;<sup>5</sup> to fix the bond of trustees of water-works as required by law;<sup>6</sup> and to pass an ordinance to levy a tax to pay a judgment against the city;<sup>7</sup> and by this writ the two councils of a city have been compelled to meet in joint session in order to appoint such heads of departments as are not elected by the people.<sup>8</sup> Should such common council, owing to diversity of views, fail to pass an ordinance commensurate with the duty to be discharged, the courts will not be satisfied therewith, but will compel the members of such council to come to an agreement and discharge the duty imposed upon them.<sup>9</sup> It is not considered proper to compel the aldermen to attend the meetings of the common council and to perform their general official duties, because the courts are not created to conduct the municipal affairs of cities, and nothing short of such general supervision could reach such a case.<sup>10</sup>

<sup>1</sup> State v. Nemaha Co., 10 Neb. 32.

<sup>6</sup> Lafayette (City) v. State, 69 Ind.

<sup>2</sup> People v. New York (Com. Council), 45 Barb. 473.

218.

<sup>3</sup> State v. Orange (Com. Council), 31 N. J. L. 131.

<sup>7</sup> People v. San Francisco (Sup'rs), 21 Cal. 668.

<sup>4</sup> People v. Detroit (Com. Council), 29 Mich. 108.

<sup>8</sup> Lamb v. Lynd, 44 Pa. St. 336.

<sup>5</sup> State v. Chase, 42 Mo. Ap. 343.

<sup>9</sup> Com. v. Taylor, 36 Pa. St. 263; People v. San Francisco (Sup'rs), 21 Cal. 668.

<sup>10</sup> People v. Whipple, 41 Mich. 548.

§ 114. **Mandamus to officers of towns.**—The writ of *mandamus* has been used to compel: a town to raise by taxation its share of the amount required for a joint high school;<sup>1</sup> the board of a township to draw its warrant on the township treasurer for damages appraised and certified on account of the establishment of a road;<sup>2</sup> the trustees of a town, to give the requisite notice for the election of their successors;<sup>3</sup> the supervisors of towns, which have been divided, to meet and apportion the poor and the moneys of their respective towns, and to re-assemble and correct their apportionment, if at their meeting they have only partially performed their work, omitting the disposition of a particular pauper;<sup>4</sup> the president of the trustees of a village to sign the bonds of the village issued according to law;<sup>5</sup> a town clerk to countersign township bonds issued in favor of a railroad company;<sup>6</sup> a town clerk to amend his record, if there is any error in it arising from design, mistake or accident,<sup>7</sup> or if it does not record the votes as publicly declared by the moderator,<sup>8</sup> but not to make his record show a different vote from that declared by the moderator, since it is his duty to enter up the record of votes as given in by the moderator.<sup>9</sup> When upon a division of a township, the two townships have divided the indebtedness of the old township between them, a *mandamus* will lie to the board of one to issue an order on its township treasurer for the payment of its share of the debt.<sup>10</sup>

§ 115. **Mandamus relative to the public schools.**—The public schools are supported and controlled by the govern-

In 1736 a mayor was required to attend the assemblies of the corporation because an act of parliament so required. *R. v. Everet*, Cas. Temp. Hardw. 261.

<sup>1</sup> *Joint F. H. School v. Green Grove (Town)*, 77 Wis. 532.

<sup>2</sup> *People v. La Grange (Tp. Board)*, 2 Mich. 187.

<sup>3</sup> *People v. Fairbury (Town)*, 51 Ill. 149.

<sup>4</sup> *Sandlake (Sup'rs) v. Berlin (Sup'rs)*, 2 Cow. 485.

<sup>5</sup> *People v. White*, 54 Barb. 622.

<sup>6</sup> *Houston v. People*, 55 Ill. 398; *People v. Cline*, 63 Ill. 394.

<sup>7</sup> *Boston T. Co. v. Pomfret (Town)*, 20 Conn. 590.

<sup>8</sup> *Hill v. Goodwin*, 56 N. H. 441.

<sup>9</sup> *Bell v. Pike*, 53 N. H. 473.

<sup>10</sup> *Marathon (Town) v. Oregon (Town)*, 8 Mich. 372.

ment, and are managed by public officers, and the writ of *mandamus* has often been used to compel the performance of duties connected therewith. This writ has been used to restore pupils who have been improperly excluded from the public schools under a rule made by the board of directors without authority.<sup>1</sup> Where an applicant for admission to a college supported by the government was refused admission, unless he would first separate himself from a society, which was not immoral a *mandamus* was issued ordering his admission, if he was otherwise eligible, such regulation being held to be unreasonable and void.<sup>2</sup> By this writ teachers in the public schools have compelled the disbursing officers for the schools to pay them their salaries,<sup>3</sup> or have compelled the proper officers to give them warrants therefor on the disbursing officers.<sup>4</sup> School directors are not personally liable on their contracts as such directors,<sup>5</sup> and where the funds of a school board were held by a city treasurer, and paid out by him on drafts issued by the school board, a creditor was allowed by a *mandamus* proceeding to prove up his claim, and to obtain an order for the school board to issue to him a draft on the city treasurer for the amount found to be due to him.<sup>6</sup> A teacher of a public school, who has been removed contrary to law by the school directors, may, by *mandamus*, compel them to restore him to his position.<sup>7</sup> This writ has been issued to compel the school directors: to supply the schools required by law to the children in their districts;<sup>8</sup> to allow the pupils to use certain text-books;<sup>9</sup> and to introduce into the schools the text-books adopted by the proper authority.<sup>10</sup> In such proceed-

<sup>1</sup> Perkins v. Ind. School District, 56 Iowa, 476; State v. Osborne, 24 Mo. App. 309.

<sup>2</sup> State v. White, 82 Ind. 278.

<sup>3</sup> Martin v. Ellwood, 35 Minn. 309; Martin v. Tripp, 51 Mich. 184; Arrington v. Cotton, 1 Baxt. 316.

<sup>4</sup> Apgar v. Trustees, 34 N. J. L. 308.

<sup>5</sup> Meadows v. Nesbit, 80 Tenn. 486.

<sup>6</sup> Raisch v. Board of Education, 81 Cal. 542.

<sup>7</sup> Morley v. Power, 73 Tenn. 691.

<sup>8</sup> Hancock v. Perry (Dist. Town.), 78 Iowa, 550.

<sup>9</sup> State v. Columbus (Board of Education), 35 Ohio St. 368.

<sup>10</sup> State v. Springfield (School Directors), 74 Mo. 21.

ings, it has been decided that children cannot be excluded from the public schools by reason of their color.<sup>1</sup> Whether the school authorities may provide separate schools for colored children, and exclude them from the other schools, is a question on which the courts are in conflict.<sup>2</sup> In accordance with the provisions of the law, towns will be required by *mandamus* to appropriate a certain proportion of the taxes to support common schools.<sup>3</sup> Where the school authorities are allowed a discretion, a *mandamus* does not lie to control such discretion. They will not be required: to approve of a school teacher;<sup>4</sup> to issue a teacher's certificate;<sup>5</sup> to approve of the bill of a school-master for educating poor children;<sup>6</sup> or to admit a boy to the public schools, because they assigned an untenable reason for his rejection, when they were not required to assign any reason for such rejection.<sup>7</sup> In matters involving discretion, school officers, like all others, may be required to consider and come to a decision thereon.<sup>8</sup> Where the action of the committee of a school district was irregular in not holding the sessions of the school in the school-house, but there was no danger of increasing the taxes thereby, the school term was nearly out, and the change was but temporary, the court, in its discretion, refused to require them to keep the school in the school-house.<sup>9</sup> A person who had obtained a judgment against a district township upon an order on the school-house fund, to whom the school directors had issued an order upon their treasurer for the payment of his judgment,

<sup>1</sup> *Smith v. Ind. School District*, 40 Iowa, 518; *Dove v. Ind. School District*, 41 Iowa, 689; *State v. Duffy*, 7 Nev. 342; *People v. Detroit Board of Education*, 18 Mich. 400; *Ward v. Flood*, 48 Cal. 36.

<sup>2</sup> *Pro: State v. Duffy*, 7 Nev. 342; *Ward v. Flood*, 48 Cal. 36. *Contra, Smith v. Ind. School District*, 40 Iowa, 518; *Dove v. Ind. School District*, 41 Iowa, 689.

<sup>3</sup> *Hall v. Somersworth (Selectmen)*, 39 N. H. 511.

<sup>4</sup> *Wintz v. Board of Education*, 28 W. Va. 227.

<sup>5</sup> *Bailey v. Ewart*, 52 Iowa, 111.

<sup>6</sup> *Com. v. County Commissioners*, 5 Binn. 536.

<sup>7</sup> *State v. Joint School District*, 65 Wis. 631.

<sup>8</sup> *Albin v. Ind. District (Board of Directors)*, 58 Iowa, 77.

<sup>9</sup> *Colt v. Roberts*, 28 Conn. 330.

was refused a *mandamus* to compel payment of his claim out of the general school fund to the exclusion of other holders of orders who had not obtained judgments. He was entitled to a *mandamus* for his *pro rata* share. His judgment only entitled him to levy, if he could find what was not exempt, or to a *mandamus* to compel the levy of a tax to pay it.<sup>1</sup> Where a school district, which is by law a corporation, orders the school committee to restore a teacher whom they have removed, they are bound to obey, and may be compelled by *mandamus* to make such restoration.<sup>2</sup> Whenever orders are issued in compliance with law against the treasurer of a school district, and he has funds in his hands applicable thereto, he will be compelled by this writ to pay them.<sup>3</sup> The writ of *mandamus* will not be granted in matters relating to public schools, when the public interests will suffer thereby. The courts had a discretion in many cases in granting this writ, and they will compel private interests to yield to public interests, and will refuse the writ, if the grant thereof will prejudice the interests of the public. In accordance with law, a committee of teachers selected a certain series of text-books to be used in the public schools of a certain county, and it became the duty of the superintendent of the county schools to contract with the publishers therefor. Subsequently the state board of education, who assumed that the committee had failed to adopt a complete list of books, ordered the superintendent to reconvene the committee for that purpose. The superintendent called the committee together again, and appointed substitutes for those members who refused to attend. The new committee then rescinded the prior action, and adopted a new series of books. The new books were supplied; the patrons of the schools bought them for their children; they were used in the schools, and the teachers were ordered to teach from them. The publishers of the

<sup>1</sup> Chase v. Morrison, 40 Iowa, 620. Mich. 170; Maher v. State (Neb.,

<sup>2</sup> Gilman v. Bassett, 33 Conn. 298. July 1, 1891), 49 N. W. Rep. 436.

<sup>3</sup> Phillips v. School District, 79

first series of books asked for a *mandamus* to compel the county superintendent to contract with them for a supply of their books. Though the court admitted the justness of the claim of the relators, yet, owing to the complications and the evil consequences likely to arise affecting the public interests, it refused to grant the writ.<sup>1</sup>

§ 116. **Mandamus to enforce duties relative to the public roads.**—A *mandamus* is the proper remedy to compel officials to perform their duties concerning public roads.<sup>2</sup> It lies to make them keep streets and highways in repair, when they are charged with such duty, or full power in such matters is bestowed on them,<sup>3</sup> and to remove obstructions therefrom when such duty is imposed upon them.<sup>4</sup> When the law provides for the indictment of parties who have placed obstructions on a highway and for the removal of such obstructions upon the conviction of such parties, a *mandamus* to the proper officers to compel the removal of such obstructions will be denied, because the law has provided another remedy.<sup>5</sup> When a bridge is owned by a county and is kept open for public travel, the county is bound to keep it in repair, and such duty will be enforced by a *mandamus*.<sup>6</sup> In accordance with their duties public officials will be required by this writ to build<sup>7</sup>, to complete,<sup>8</sup> and to maintain<sup>9</sup> public bridges, and to keep them in repair,<sup>10</sup> which includes a new superstructure, or a rebuilding, or a replacing, if for any cause it may become necessary.<sup>11</sup>

<sup>1</sup> Effingham v. Hamilton, 68 Miss. 523.

<sup>2</sup> State v. Putnam Co. (Com'rs), 23 Fla. 632.

<sup>3</sup> Hammar v. Covington (City), 3 Metc. (Ky.) 494; St. Clair County v. People, 85 Ill. 396; People v. Bloomington (City), 63 Ill. 207; Uniontown (Borough) v. Com., 34 Pa. St. 293.

<sup>4</sup> Patterson v. Vail, 43 Iowa, 142.

<sup>5</sup> Highways (Com'rs) v. People, 73 Ill. 203; Reading (Councils) v. Com., 11 Pa. St. 196.

<sup>6</sup> State v. Wood Co. (Sup'rs), 41 Wis. 28.

<sup>7</sup> Com. v. Sheehan, 81 Pa. St. 132; People v. San Francisco (Sup'rs), 36 Cal. 595.

<sup>8</sup> Com. v. Loomis, 128 Pa. St. 174.

<sup>9</sup> Pumphrey v. Baltimore (Mayor), 47 Md. 145.

<sup>10</sup> Ottawa (City) v. People, 48 Ill. 233.

<sup>11</sup> Howe v. Crawford Co. (Com'rs), 47 Pa. St. 361; State v. Gibson Co. (Com'rs), 80 Ind. 478; State v. Demaree, 80 Ind. 519.



This writ will issue to compel the proper officers to open a highway which has been legally established,<sup>1</sup> to lay out a road,<sup>2</sup> and to grant an application to establish a private road.<sup>3</sup> As being ministerial duties, this writ has been issued: to compel the county commissioners to draw a warrant for the damages assessed by a jury for land taken for laying out a highway, though measures were then pending to discontinue such proceedings;<sup>4</sup> to compel the selectmen of a town to pay the damages assessed as sustained by the laying out of a highway,<sup>5</sup> and to summon a jury to locate a highway after the jury summoned by the coroner has disagreed.<sup>6</sup> The writ has been refused, because it was discretionary with the officers to act or not: to build a bridge, though they had levied one year's tax to assist the construction;<sup>7</sup> to proceed in opening a street, the property having been abandoned before a tender or payment of the damages assessed;<sup>8</sup> to lay out a road when public convenience and necessity no longer required it, and they had so decided;<sup>9</sup> to compel a police jury to make a contract or pass an ordinance authorizing the construction or shelling of a public road;<sup>10</sup> to lay out a road when they reported another road substantially identical has been laid out and accepted which would fully satisfy public wants;<sup>11</sup> to rebuild a bridge;<sup>12</sup> to appropriate money to rebuild a fallen bridge, when they had power to establish or change highways, and such bridge was part of a highway.<sup>13</sup> Where officers have a discretion as

<sup>1</sup> Moon v. Cort, 43 Iowa, 503; Sheaff v. People, 87 Ill. 189; People v. Davis, 93 Ill. 133; Hall v. People, 57 Ill. 307; State v. Wellman, 83 Me. 282; People v. Collins, 19 Wend. 56.

<sup>2</sup> Sanger v. Kennebec Co. (Com'rs), 25 Me. 291.

<sup>3</sup> Steele v. County Com'rs, 83 Ala. 304.

<sup>4</sup> Harrington v. Berkshire Co. (Com'rs), 22 Pick. 263.

<sup>5</sup> Treat v. Middletown (Town), 8 Conn. 243.

<sup>6</sup> Mendon (Inhabitants) v. Worcester County, 10 Pick. 235.

<sup>7</sup> State v. Henry Co. (Com'rs), 31 Ohio St. 211.

<sup>8</sup> State v. Graves, 19 Md. 351.

<sup>9</sup> Hill v. Worcester, 4 Gray, 414.

<sup>10</sup> State v. Jefferson Co. (Police Jury), 22 La. An. 611.

<sup>11</sup> Hitchcock v. Hampden Co. (Com'rs), 131 Mass. 519.

<sup>12</sup> State v. Essex (Freeholders), 23 N. J. L. 214.

<sup>13</sup> State v. Morris, 43 Iowa, 192.

to when or how they shall repair a bridge, though a *mandamus* may issue to compel them to repair it, yet it will not direct the manner of performing such duty but will order its performance generally.<sup>1</sup> The acceptance or rejection by the county commissioners of the report of a committee, appointed by agreement, pursuant to the law, to assess the amount of damages sustained by the laying out of a public road, is judicial, and a *mandamus* will not lie to compel the acceptance of the report.<sup>2</sup> The commissioners of highways were not required to make a contract to pave certain streets with the person selected by a majority of the property-owners, since they were only required so to do if such person were competent, and they had a discretion in judging as to his competency.<sup>3</sup> A *mandamus* does not lie to make a county pay a part of the expense incurred by a town in making a highway, when the county commissioners, having a discretion in the matter, have rejected an application for such a payment.<sup>4</sup> When the county commissioners refuse to locate and open a road on the report of the reviewers, a *mandamus* will not lie, because the statute gives a remedy by appeal.<sup>5</sup> Since the writ only lies to enforce a duty, commissioners of highways will not be compelled by *mandamus* to lay out a highway so as to commit trespass or to subject them to an action of trespass,<sup>6</sup> nor be required to certify that the public roads are kept in good repair for the benefit of a contractor, though the court finds that such is the fact, since such officers have a discretion in that matter.<sup>7</sup>

**§ 117. Mandamus relative to letting public contracts.** The law generally requires public officers, who are charged

<sup>1</sup> St. Clair (County) v. People, 85 Ill. 396; State v. Demaree, 80 Ind. 519.

<sup>2</sup> Kennebunk T. Bridge Proprietors, Petitioners, 11 Me. 263.

<sup>3</sup> Dickerson v. Peters, 71 Pa. St. 53.

<sup>4</sup> Ipswich, Inhabitants of, Petitioners, 24 Pick. 343.

<sup>5</sup> Boone Co. (Com'rs) v. State, 38 Ind. 193.

<sup>6</sup> People v. Highways (Com'rs), 27 Barb. 94; Clapper, Ex parte, 3 Hill, 458.

<sup>7</sup> Seymour v. Ely, 37 Conn. 103.

with letting contracts for public work, to accept the lowest bid therefor, and to make the contract accordingly. When such bidder has fully complied on his part with the requirements of the law, he may by the writ of *mandamus* compel the officer to make the contract with him. The writ has been considered appropriate in relation to a contract for constructing county buildings,<sup>1</sup> for state printing,<sup>2</sup> for articles to be purchased for use of the county for building a bridge,<sup>3</sup> and for repairing the Erie canal.<sup>4</sup> When the officer is allowed a discretion in the matter, the writ will be refused.<sup>5</sup> It has been refused: because the officer could decline the bids if he deemed them to be excessive or disadvantageous to the state;<sup>6</sup> because the officer was only required to let the contract to the lowest bidder if he was responsible,<sup>7</sup> or if he furnished adequate security;<sup>8</sup> because the contract was to be let to the lowest responsible bidder, and the contract in the case required for its fulfillment pecuniary ability, judgment and skill,<sup>9</sup> and because in the advertisement the right to reject any and all bids was reserved.<sup>10</sup> Where a person appeared to be the lowest bidder by the aggregate of the prices of the various articles desired, but to be a higher bidder when the amounts required of the various articles were considered, a *mandamus* in his favor was refused.<sup>11</sup> When the provision that the contract shall be let to the lowest bidder is considered to be directory merely, the writ is refused.<sup>12</sup> When after the receipt of the

<sup>1</sup> *Boren v. Darke Co. (Com'rs)*, 21 Ohio St. 311; *State v. Licking Co. (Com'rs)*, 26 Ohio St. 531.

<sup>2</sup> *State v. Barnes*, 35 Ohio St. 136; *State v. Printing Com'rs*, 18 Ohio St. 386; *American C. Co. v. Licking Co. (Com'rs)*, 31 Ohio St. 415.

<sup>3</sup> *People v. Buffalo Co. (Com'rs)*, 4 Neb. 150.

<sup>4</sup> *People v. Contract Board*, 46 Barb. 254.

<sup>5</sup> *People v. Contracting Board*, 27 N. Y. 378.

<sup>6</sup> *People v. Contracting Board*, 33 N. Y. 382.

<sup>7</sup> *Hoole v. Kinkead*, 16 Nev. 217.

<sup>8</sup> *People v. Fay*, 3 Lansing, 398.

<sup>9</sup> *Com. v. Mitchell*, 82 Pa. St. 343.

<sup>10</sup> *Hanlin v. Ind. District*, 66 Iowa, 69.

<sup>11</sup> *State v. Hamilton Co. (Com'rs)*, 20 Ohio St. 425.

<sup>12</sup> *Free Press Assoc. v. Nichols*, 45 Vt. 7.

bids the proposed work has been materially changed, so much so that the public interests require a new advertisement to conform to such changes, the courts, exercising their discretion in such matters, refuse to grant the writ.<sup>1</sup> Some courts have refused absolutely to issue the writs in such cases, holding that the bidder has no fixed absolute right to the contract; that the provision about letting the contract to the lowest bidder was intended for the protection of the public and not of the bidder; that if any injury is done it is to the public, that the bidder's rights are not different from those of the public; that his profits are speculative and at most he has a claim for damages.<sup>2</sup>

§ 118. **Mandamus relative to the approval of bonds by officers.**—In many cases the law requires bonds from officers for the faithful performance of their duties, and from private individuals, that in certain actions or occupations they will comply with the requirements of the law. These bonds are necessarily subject to the approval of other officers. Whether in the consideration of these bonds the approving officers are acting ministerially, and therefore subject to a review of their decisions by the courts through the writ of *mandamus*, or are acting judicially, in which case their decisions rejecting such bonds are final, is a question which depends very much upon the local laws in each case. Since the line of demarcation between ministerial and judicial acts cannot be drawn, we can only refer to some decisions on the subject, and it will be found that the courts differ in their conclusions. The county court,<sup>3</sup> the circuit court clerk<sup>4</sup> and the judge of probate,<sup>5</sup> in approving a sheriff's bond act ministerially. The committee in approving a constable's bond,<sup>6</sup> the chancery clerk in approving official bonds,<sup>7</sup> the comptroller of the state in approving the

<sup>1</sup> *People v. Croton Aqued. Board*, 49 Barb. 259.

<sup>2</sup> *State v. Board of Education*, 24 Wis. 683; *Com. v. Mitchell*, 82 Pa. St. 343; *People v. Contracting Board*, 27 N. Y. 378.

<sup>3</sup> *State v. Lafayette Co. Court*, 41 Mo. 221.

<sup>4</sup> *Gulick v. New*, 14 Ind. 93.

<sup>5</sup> *Candee, Ex parte*, 48 Ala. 386.

<sup>6</sup> *Prickett, In re*, 20 N. J. L. 134.

<sup>7</sup> *Swan v. Gray*, 44 Miss. 393.

bonds of county officers,<sup>1</sup> the clerk of the circuit court in approving a bond for security for costs in a suit to contest an election for a judge of probate,<sup>2</sup> and the clerk of the court in approving a bond for an attachment,<sup>3</sup> all act judicially. A duly elected township trustee may by this writ compel the acceptance and approval of his official bond.<sup>4</sup>

§ 119. **Mandamus about issuing licenses.**—When officers have no discretion about issuing licenses, a *mandamus* will issue to compel them to do so, if the applicant has complied on his part with all the requirements of the law. When there is no discretion allowed, a *mandamus* lies to compel the issuance of a dram-shop license;<sup>5</sup> but very frequently it has been denied, because the licensing officer was allowed a discretion.<sup>6</sup> The officer was considered to have a discretion: when the bondsmen on the bond of a dram-shop keeper were required to live in the village and to justify in an amount equal to the face of the bond, and the officer was required to determine the sufficiency of the bond;<sup>7</sup> and when the applicant for a license was required to be recommended by five respectable freeholders of his immediate neighborhood.<sup>8</sup> An officer cannot be compelled to issue a license to sell whisky, when a majority of the police board have not assented thereto, which is required by the law prior to such issuance.<sup>9</sup> No one has a vested right to sell liquor, and, prior to the issuance of a license, the tax thereon may by law be increased or the privilege of selling liquor at all may be abrogated; in the one case the writ will not issue to compel the issuance of a license

<sup>1</sup> State v. Barnes, 25 Fla. 298.

<sup>2</sup> McDuffie v. Cook, 65 Ala. 430.

<sup>3</sup> Mobile, etc. Co. v. Cleveland, 76 Ala. 321.

<sup>4</sup> Copeland v. State, 126 Ind. 51.

<sup>5</sup> Bean v. Barton Co. Court, 33 Mo. Ap. 635; State v. Ruark, 34 Mo. Ap. 325.

<sup>6</sup> Louisville (City) v. Kean, 18 B. Mon. 9; Schlaudecker v. Marshall, 72 Pa. St. 200; Pearsons, Ex parte,

1 Hill, 655; Maxton Co. (Com'rs) v.

Robeson Co. (Com'rs), 107 N. C. 335;

Jones v. Moore Co. (Com'rs), 106 N. C. 436; Dunbar v. Frazer, 78 Ala. 538; Yeager, Ex parte, 11 Grat. 655; Ramagnano v. Crook, 85 Ala. 226.

<sup>7</sup> Parker v. Portland, 54 Mich. 308.

<sup>8</sup> Devin v. Belt, 70 Md. 352.

<sup>9</sup> Purdy v. Sinton, 56 Cal. 133.

to sell liquor dispensing with the payment of such increased tax,<sup>1</sup> and in the other will not issue at all.<sup>2</sup> When the law required physicians to have a diploma from legally chartered medical institutions in good standing before they were allowed to practice their profession, a *mandamus* to the state board of health, to issue a license to a physician allowing him to practice medicine, was refused, because such board had a discretion in determining whether medical institutions were in good standing.<sup>3</sup> When a discretion is allowed as to licensing a ferry, a *mandamus* will not lie to compel the issuance of such a license.<sup>4</sup> When the board which has a discretion in the matter has considered the petition for a license and has refused it, its action cannot be reviewed or reversed by this writ.<sup>5</sup>

§ 120. **Mandamus to police officials.**— If a board of police commissioners wrongfully discharge a police officer,<sup>6</sup> or dismiss him without cause or without a trial,<sup>7</sup> or for a cause not allowed by law,<sup>8</sup> he may obtain his restoration to his position by the writ of *mandamus*. A captain of police may by this writ compel the police commissioners to pay him the salary allowed to him by law.<sup>9</sup> A surgeon employed by a police board may by this writ compel them to draw their requisition in his favor for his salary as fixed by law, though he has contracted with them for a smaller compensation.<sup>10</sup> A *mandamus* is permissible to compel the police commissioners to vacate their order to the police not to interfere with the selling of wine and liquors on Sunday, and to compel them to have the laws obeyed, but not to

<sup>1</sup> *Sights v. Yarnalls*, 12 Grat. 292.

<sup>2</sup> *State v. Bonnell*, 119 Ind. 494.

<sup>3</sup> *State v. Gregory*, 83 Mo. 123.

<sup>4</sup> *State v. Cramer*, 96 Mo. 75; *Thomas v. Armstrong*, 7 Cal. 286.

In the last case it was considered that the writ would issue, if the refusal to issue the license was due to a mistake of law. This is contrary to most of the decisions. *Ante*, § 39.

<sup>5</sup> *Collarn's Petition*, 134 Pa. St. 551.

<sup>6</sup> *People v. Police Board*, 35 Barb. 527, 535, 544, 644, 651; *People v. French*, 102 N. Y. 583.

<sup>7</sup> *Riley v. Kansas City*, 31 Mo. Ap. 439.

<sup>8</sup> *Hawkins v. Kercheval*, 78 Tenn. 535.

<sup>9</sup> *People v. Smith*, 77 N. Y. 347.

<sup>10</sup> *People v. Board of Police*, 75 N. Y. 38.

direct them generally as to the performance of their duties, many of which admit of discretion as to the manner of their performance.<sup>1</sup> A *mandamus* will not lie to any officer directing a general course of conduct. It may be granted relative to a specific act.<sup>2</sup> It may issue relative to one act or one order. It may issue generally to police authorities, when they refuse to perform their public duty, to perform such duty, but cannot specifically direct them how to perform it.<sup>3</sup>

§ 121. *Mandamus to clerk of the county board.*—This writ has been issued to the clerk of the county board: to sign an order on the county treasurer for an account allowed and ordered to be paid by the county board of supervisors;<sup>4</sup> to transfer records and suits to another county as provided by law;<sup>5</sup> to issue a proper tax deed, the one already issued being fatally defective;<sup>6</sup> to put the county seal on a county warrant, which his predecessor had omitted to do;<sup>7</sup> to report the amount of fees he had received as required by law;<sup>8</sup> and to record the acts of the county commissioners in surveying a road, though he claimed the parties were not the proper commissioners, since he, being a mere ministerial officer, is not allowed to adjudge the acts of *de facto* officers to be null.<sup>9</sup> This writ will not lie to the county clerk to correct the records of the board of supervisors of the county, since such records are under the control of that board.<sup>10</sup>

§ 122. *Mandamus to the clerk of a court.*—This writ has often been used to compel the clerk of a court to fulfill various ministerial duties incumbent upon him.<sup>11</sup> Where, however, such duties involve judgment or discretion the

<sup>1</sup> State v. Francis, 95 Mo. 44.

<sup>7</sup> Prescott v. Gonser, 34 Iowa, 175.

<sup>2</sup> State v. Murphy, 3 Ohio C. C. 332.

<sup>8</sup> State v. Whittemore, 12 Neb. 252.

<sup>3</sup> State v. Columbus (Police Board), 19 Weekly L. Bul. 347.

<sup>9</sup> People v. Collins, 7 Johns. 549.

<sup>4</sup> State v. Richter, 37 Wis. 275.

<sup>10</sup> Wigginton v. Markley, 52 Cal. 411.

<sup>5</sup> State v. McKinney, 5 Nev. 194.

<sup>11</sup> See § 85.

<sup>6</sup> Bryson v. Spaulding, 20 Kans. 427; State v. Winn, 19 Wis. 304.

writ will be refused. He was not required to issue an execution, because the judgment was ambiguous.<sup>1</sup> Under a decree calling for periodic payments of alimony, a *mandamus* was refused to compel him to issue an execution for a certain large sum of money, because he could not assume that so much money was in arrears.<sup>2</sup> Though a *mandamus* is the proper remedy to compel all officers to perform purely ministerial duties, it has been refused in the case of the clerk of a court, because there was another remedy provided by law;<sup>3</sup> because a suit on his bond was deemed to be a sufficient remedy,<sup>4</sup> or because the court in its discretion refused to interfere, allowing the relator to obtain his redress by an application to the court itself, whereof the respondent was the clerk.<sup>5</sup>

§ 123. **Mandamus to a sheriff.**—The writ of *mandamus* has been issued to compel a sheriff: to execute a writ of execution;<sup>6</sup> to carry out the decree of the court and put a party in possession of property;<sup>7</sup> to erase changes made in his return and make it conform to its original terms when such original return was correct;<sup>8</sup> to surrender property which he is no longer entitled to hold, as when on appeal the bond is not filed in time,<sup>9</sup> or a wife claims that her husband is insolvent, and has given bond and security for the forthcoming of the household property levied on for the husband's debt;<sup>10</sup> to appoint appraisers to appraise the property of the debtor,<sup>11</sup> and have the proper amount set apart as exempt from execution;<sup>12</sup> to sell an estate as an entirety at the request of the mortgagee;<sup>13</sup> and to make a deed to the purchaser of property sold by him at execution sale.<sup>14</sup>

<sup>1</sup> Hall v. Stewart, 23 Kans. 396.

<sup>2</sup> Compton v. Airial, 9 La. An. 496.

<sup>3</sup> Pickell v. Owen, 66 Iowa, 485.

<sup>4</sup> Goodwin v. Glazer, 10 Cal. 333.

<sup>5</sup> See § 85.

<sup>6</sup> North P. etc. R. R. v. Gardner, 79 Cal. 213.

<sup>7</sup> Quan Wo Chung v. Laumeister, 83 Cal. 384.

<sup>8</sup> Ward v. Curtiss, 18 Conn. 290.

<sup>9</sup> State v. Cunningham, 9 Neb. 146.

<sup>10</sup> Mitchell v. Hay, 37 Ga. 581.

<sup>11</sup> People v. McClay, 2 Neb. 7.

<sup>12</sup> Pudney v. Burkhart, 62 Ind. 179.

<sup>13</sup> Morris v. Womble, 30 La. An. 1312.

<sup>14</sup> Winters v. Burford, 6 Cold. 328; People v. Fleming, 4 Denio, 137;



But the writ will not lie to compel the sheriff to do an act, unless it is clearly his duty to do so. He will not be required to give a deed to the purchaser at an execution sale, who refuses to pay the amount of his bid, claiming to be the oldest judgment and execution creditor, especially when there is an unsettled contest as to the lien of his judgment.<sup>1</sup> Where the purchaser at a sheriff's sale waited for nearly two years, and until the sheriff had resold nearly all the land and had failed to pay the amount of his bid, he was denied a *mandamus* to compel the sheriff to make him a deed.<sup>2</sup> A sheriff cannot be required by *mandamus* to execute a deed to a purchaser at an execution sale which contains recitals contradicted by his return, which he claims to be true.<sup>3</sup> A marshal cannot be compelled to execute a judgment on particular property, the title to which is in dispute,<sup>4</sup> nor a sheriff to levy on property standing in the wife's name in a suit against the husband, since the relator has not a clear legal right.<sup>5</sup> Where a sheriff fails to give his official bond within the time limited by law, his office is by law declared to be vacant, and a writ of *mandamus* will not lie to the county judge to accept a bond tendered thereafter.<sup>6</sup> A sheriff will not be compelled to pay to the owner a surplus received upon the sale of his land for taxes, since there is an adequate remedy by a suit at law against the sheriff.<sup>7</sup>

§ 124. *Mandamus to a register of deeds.*—The writ of *mandamus* has been issued to a register of deeds to compel him: to record a deed presented to him for that purpose;<sup>8</sup> to file and enter the satisfaction of a mortgage;<sup>9</sup> to allow the officers authorized by law or their agents the use of a part of his office and access to his records, in order to enable them to transcribe such of those records as relate to lands

Van Rensselaer v. Sheriff, 1 Cow. 501.

<sup>1</sup> Williams v. Smith, 6 Cal. 91.

<sup>2</sup> People v. Hays, 5 Cal. 66.

<sup>3</sup> Hewell v. Lane, 53 Cal. 213.

<sup>4</sup> Life, etc. Ins. Co. v. Adams, 9 Pet. 571.

<sup>5</sup> State v. Craft, 17 Fla. 723.

<sup>6</sup> Lowe v. Phelps, 14 Bush. 642.

<sup>7</sup> State v. Turner, 32 S. C. 348.

<sup>8</sup> Strong's Case, Kirby, 345; Goodell, Ex parte, 14 John. 325.

<sup>9</sup> People v. Miner, 37 Barb. 466.

in a new county, which once constituted a part of the county to which such records belong.<sup>1</sup> Since the writ only issues relative to the discharge of official duties, it will not issue to compel a register of deeds to record a deed which he did not receive officially but as an escrow, and more especially when one of the parties to such delivery has forbidden him to deliver up or to record said deed.<sup>2</sup>

**§ 125. Mandamus to keep public offices in the proper places.**—The writ of *mandamus* is the proper remedy to make judges hold their courts, and county officers keep their offices, at the county seat,<sup>3</sup> and to compel other officers to keep their offices within the districts or precincts for which they are elected.<sup>4</sup> Such questions often present themselves to a court by reason of a dispute as to the result of an election to decide the location of the county seat. A *mandamus* is considered to be the proper mode whereby to decide the result of the election,<sup>5</sup> unless another remedy has been provided by statute.<sup>6</sup> The result of the election as declared by the county commissioners is considered to be *prima facie* correct,<sup>7</sup> but it may be rebutted<sup>8</sup> if fraud is shown.<sup>9</sup>

**§ 126. Mandamus to auditing officers.**—This writ runs to public auditing officers to compel them to discharge their ministerial duties. Where a claim has been allowed by the proper authority, the duty of an auditor to audit it and draw his warrant on the proper disbursing officer is merely a ministerial duty, and he will be compelled by the writ of *mandamus* to perform this duty, upon his refusal to do so.<sup>10</sup>

<sup>1</sup> *Silver v. People*, 45 Ill. 224; *Hawes v. White*, 66 Me. 305; *State v. Meadows*, 1 Kans. 90.

<sup>2</sup> *People v. Curtis*, 41 Mich. 723.

<sup>3</sup> *Calaveras (County) v. Brockway*, 30 Cal. 325; *Maxey v. Mack*, 30 Ark. 472; *State v. Walker*, 5 Rich. (N. S.) 263; *State v. Thatch*, 5 Neb. 94; *State v. Lean*, 9 Wis. 279; *State v. Avery*, 14 Wis. 122; *State v. Marston*, 6 Kans. 524.

<sup>4</sup> *State v. Shropshire*, 4 Neb. 411.

<sup>5</sup> *State v. Avery*, 14 Wis. 122; *State v. Saxton*, 11 Wis. 27.

<sup>6</sup> *State v. Stevens*, 23 Kans. 456.

<sup>7</sup> *State v. Thatch*, 5 Neb. 94.

<sup>8</sup> *State v. Avery*, 14 Wis. 122.

<sup>9</sup> *State v. Marston*, 6 Kans. 524.

<sup>10</sup> *People v. Green*, 56 N. Y. 466; *Babcock v. Goodrich*, 47 Cal. 488; *People v. Schuyler*, 69 N. Y. 242; *State v. Mount*, 21 La. An. 352;

If, however, such proper authority allowed a claim when it had no jurisdiction in the matter,<sup>1</sup> or allowed an illegal claim,<sup>2</sup> or an appeal has been taken from the decision and the allowance has been legally annulled,<sup>3</sup> the auditor may properly refuse to issue his warrant. When such auditing officer has a discretion in auditing a claim and in determining the amount justly due, a *mandamus* will not lie to compel him to audit such claim for a certain amount,<sup>4</sup> since such action is judicial in its character.<sup>5</sup> When, however, in his return to the alternative writ the respondent tendered an issue as to the amount due to the relator and asked that such issue be submitted to a jury, the court considered that he was bound by the verdict of the jury and ordered him to issue a warrant for the sum so found to be owing; whereas, if he had not offered to submit the matter to the jury, the order would have been to audit the account and to issue his warrant for the sum he found to be owing.<sup>6</sup> Since such allowance is a judicial act, the auditing officer or board has no power afterwards to review, reverse, vacate or set aside such allowance;<sup>7</sup> but a *mandamus* has been granted at the instance of third parties to compel an auditing board, which had allowed to a county treasurer more fees than the law permitted, to reconsider, revoke and annul the allowance as to such excess.<sup>8</sup> When an auditing officer has allowed a claim, he may be compelled by *mandamus* to draw his warrant on the proper officer for its payment.<sup>9</sup>

Falk v. Strother, 84 Cal. 544; Cuthbert v. Lewis, 6 Ala. 262; Jack v. Moore, 66 Ala. 184; Kemerer v. State, 7 Neb. 130. See §§ 104, 105.

<sup>1</sup> People v. Green, 56 N. Y. 466.

<sup>2</sup> State v. Yeatman, 22 Ohio St. 546.

<sup>3</sup> State v. Buckles, 39 Ind. 272.

<sup>4</sup> People v. New York (Sup'rs), 1 Hill, 362; People v. San Francisco (Sup'rs), 11 Cal. 42; Tuolumne Co. v. Stanislaus Co., 6 Cal. 440; Bright v. Chenango Co. (Sup'rs), 18 John.

242; Auditorial Board v. Arles, 15 Tex. 72; Auditorial Board v. Hendrick, 20 Tex. 60.

<sup>5</sup> People v. Livingston Co. (Sup'rs), 26 Barb. 118; Tilden v. Sacramento Co. (Sup'rs), 41 Cal. 68.

<sup>6</sup> State v. Warner, 55 Wis. 271.

<sup>7</sup> State v. Buffalo Co., 6 Neb. 454; Thomas v. Smith, 1 Mont. 21.

<sup>8</sup> People v. Westchester Co., 73 N. Y. 173.

<sup>9</sup> State v. Mount, 21 La. An. 352.

When such auditing officer or board, possessing such discretionary powers, refuses to consider a proper claim for any reason, a *mandamus* will issue to compel such consideration and a decision thereon.<sup>1</sup> In auditing an account the auditing officers must audit each separate and distinct item which is a legal charge. If they merely reduce the gross sum, without allowing or disallowing any particular item, a *mandamus* will lie to compel a proper audit.<sup>2</sup> The law must impose the duty of auditing such claims on an officer before he can be required to do so. A county auditor was not required to draw his warrant for a claim allowed and audited by the county of supervisors, because the law only required him to draw his warrant for claims audited by himself.<sup>3</sup> A receiver of public moneys asked for a *mandamus* to compel the examination and auditing of his accounts. It was refused, because the auditors were appointed by law to examine the accounts of public moneys, which the crown might submit to them.<sup>4</sup> When a claim is shown not to be a legal charge, a *mandamus* will not lie to audit it and issue a warrant for its payment. The writ was refused to compel town auditors to audit as a claim against the town a judgment obtained against highway officers for torts committed by them in the discharge of their duties.<sup>5</sup> When another officer is charged with the ascertainment and liquidation of an account, an auditor will not be required to audit it till it has been allowed by such officer.<sup>6</sup> Where a legislature had directed a city to pay a debt contracted in

<sup>1</sup> State v. Hamilton Co. (Com'rs), 26 Ohio St. 364; People v. New York (Sup'rs), 32 N. Y. 473; People v. Macomb Co. (Sup'rs), 3 Mich. 475; Hull v. Oneida Co. (Sup'rs), 19 John. 259; People v. Columbia Co. (Sup'rs), 67 N. Y. 330; Smith v. Strobach, 50 Ala. 462; Auditorial Board v. Arles, 15 Tex. 72; Auditorial Board v. Hendrick, 20 Tex. 60; State v. Wilson, 17 Wis. 687; People v. Bell, 4 Cal. 177.

<sup>2</sup> People v. Elmira (Town Aud.), 82 N. Y. 80; People v. Delaware Co. (Sup'rs), 45 N. Y. 196.

<sup>3</sup> Draper v. Noteware, 7 Cal. 276.

<sup>4</sup> Edmunds, Ex parte, L. T. R. 25 N. S. 705.

<sup>5</sup> People v. Town Auditors, 74 N. Y. 310; People v. Town Auditors, 75 N. Y. 316.

<sup>6</sup> Putnam Co. (Com'rs) v. Allen Co. (Aud.), 1 Ohio St. 322; State v. Bonebrake, 4 Kans. 247.

violation of the restrictions placed on it and the city wished to pay it, its comptroller was not allowed to set at naught its will, but was compelled to draw his warrant therefor on the city chamberlain.<sup>1</sup> The weight of authority is, that an auditor will not be required to draw his warrant, unless there are funds in the hands of the officer on whom it is drawn wherewith to pay it.<sup>2</sup> The reason for such ruling must depend largely upon the duties of the auditor. If the records kept in his office keep him fully informed as to the money in the hands of the disbursing officer, it would seem unnecessary to compel him to issue his warrant; and it would be the same where such claim could not be paid for lack of an appropriation.<sup>3</sup> Otherwise it seems appropriate to allow the claimant the proper voucher, and require the officer to do his plain duty, so that the money may be paid as soon as it is received. The writ has been issued under such circumstances, the courts stating that the auditing officer had nothing to do with the question of payment and had no right to interpose such an objection against the discharge of his own duty.<sup>4</sup> Where sufficient money should be on hand to pay off a claim, but it has been applied wrongfully, it has been considered in law still to be on hand, and a *mandamus* has been granted to compel the issuance of a warrant.<sup>5</sup> The writ has also been issued where the money has been wrongfully credited to other accounts, and the auditor has been required to correct his books accordingly.<sup>6</sup> An auditor has been compelled to issue a warrant, though in his answer he alleged that he had issued a warrant for the relator which was levied on by a constable, who sold it, because under the law such warrants were not liable to seiz-

<sup>1</sup> *People v. Haws*, 36 Barb. 59.

<sup>3</sup> *People v. Burrows*, 27 Barb. 89;

<sup>2</sup> *Com. v. Lancaster Co. (Com'rs)*, 6 Binn. 5; *People v. New York (Compt.)*, 77 N. Y. 45; *State v. Starling*, 13 S. C. 262; *Board of Improv. v. McManus*, 54 Ark. 446; *Lancaster Co. (Com'rs) v. State*, 13 Neb. 523.

*People v. Tremain*, 29 Barb. 96.

<sup>4</sup> *State v. Clinton*, 28 La. An. 47; *State v. Hoffman*, 35 Ohio St. 435. See § 105.

<sup>5</sup> *People v. New York (Compt.)*, 77 N. Y. 45.

<sup>6</sup> *People v. Bell*, 4 Cal. 177.

ure, and the relator had never received it.<sup>4</sup> The performance of other ministerial duties imposed by law on auditors have been enforced by this writ. They have been required to furnish for taxation a list of the stockholders for a railroad company upon the failure of the company to do so,<sup>2</sup> to allow a collector of taxes credit for certain payments made by him,<sup>3</sup> and to sign leases made by a city.<sup>4</sup>

**§ 127. Mandamus to assessors of taxes.**—The writ of *mandamus* lies to compel assessors of taxes to do their duty.<sup>5</sup> It lies to make them assess all property which is subject to taxation;<sup>6</sup> to extend on the collector's books the taxes according to the increased valuation of property in the county made by the state board of equalization;<sup>7</sup> enter on the assessment book the delinquent taxes of the preceding year;<sup>8</sup> strike an illegal assessment from the assessment roll;<sup>9</sup> reduce an assessment;<sup>10</sup> hear claims of parties relative to taxes paid as assessed against exempt property, and if so paid determine the amount, audit, levy, collect and repay the same;<sup>11</sup> transfer from A.'s name on the assessment book certain property to B.'s name, to whom A. has conveyed it;<sup>12</sup> extend a school tax upon the tax books according to the estimate furnished by the district school directors,<sup>13</sup> or by the board of education;<sup>14</sup> assess as a tax the amount required for the poor of a city for any year as determined by the

<sup>1</sup> People v. Wayne Co. (Auditors), 5 Mich. 223.

<sup>2</sup> State v. Hamilton, 5 Ind. 310.

<sup>3</sup> People v. Miner, 46 Ill. 384.

<sup>4</sup> People v. Green, 64 N. Y. 499.

<sup>5</sup> State v. Whitworth, 8 Lea, 594.

<sup>6</sup> Hyatt v. Allen, 54 Cal. 353; Maxwell v. State, 40 Md. 273; Q. v. Barnwell (Com'rs Land Tax), 11 Mod. 206; State v. Shearer, 30 Cal. 645; Sullivan v. Peckham, 16 R. I. 525; State v. Whitworth, 8 Lea, 594; Ford v. Cartersville (Mayor), 84 Ga. 213; State v. Buchanan, 24 W. Va. 362. It is not a remedy for

unequal taxation. Butler v. Coblet, 11 Mod. 254; Sullivan v. Peckham, *supra*.

<sup>7</sup> People v. Salomon, 54 Ill. 39.

<sup>8</sup> People v. Ashbury, 46 Cal. 523.

<sup>9</sup> People v. Barton (Assessors), 44 Barb. 148.

<sup>10</sup> People v. Olmsted, 45 Barb. 644.

<sup>11</sup> People v. Otsego Co. (Sup'rs), 53 Barb. 564.

<sup>12</sup> Cincinnati College v. Yeatman, 30 Ohio St. 276.

<sup>13</sup> State v. Byers, 67 Md. 706.

<sup>14</sup> People v. Bennett, 54 Barb. 480.

common council of the city;<sup>1</sup> issue a tax duplicate for the tax on real estate in the county without adding to the valuation a per cent. added by a state board of equalization which was not legally constituted;<sup>2</sup> reduce the assessed value of realty in a town as determined by the board of supervisors,<sup>3</sup> and include in the estimate of taxes a balance due on a claim previously allowed against the county.<sup>4</sup> When the assessment rolls have passed from the control of the assessors, no *mandamus* will issue to them relative to such matters.<sup>5</sup> Assessors of taxes must, prior to any judicial construction, in the discharge of their duties obey the law as construed by the governor of the state. If such construction is plainly wrong, a *mandamus* will not issue to an assessor to obey it, not on account of the assessor, but in order not to cause expensive litigation, which might grow out of an act clearly illegal; if such construction of the law by the governor is not plainly wrong, the court will not pass on it until a proper case is brought before the court by parties interested therein.<sup>6</sup> An assessor will not be required to place on his tax duplicate certain taxes levied by a city, when such taxes exceed the rate of taxation allowed by law.<sup>7</sup> When the act calls for discretion and judgment, as the correction of an error in a tax duplicate, this writ will be refused.<sup>8</sup>

§ 128. **Mandamus relative to subscriptions by municipal corporations to railroads, etc.**—From time to time acts of the legislature have been passed which authorized municipal corporations to subscribe to the stock of railroads and similar enterprises, and to issue their bonds in payment thereof. Questions have arisen under such acts, wherein the assistance of the courts has been sought to enforce the

<sup>1</sup> Albany (Com. Council), Ex parte, 3 Cow. 358.      <sup>2</sup> 328; People v. Westchester (Sup'rs), 15 Barb. 607.

<sup>2</sup> Hamilton v. State, 3 Ind. 452.

<sup>5</sup> State v. Buchanan, 24 W. Va.

<sup>3</sup> Ridley v. Doughty, 77 Iowa, 226.

362.

<sup>4</sup> State v. Cathers, 25 Neb. 250.

<sup>7</sup> State v. Humphreys, 25 Ohio

<sup>5</sup> State v. Archibald, 43 Minn. St. 520.

<sup>8</sup> Lynch, Ex parte, 16 S. C. 32.

duties imposed thereby on municipal corporations. When a municipal corporation is authorized to subscribe to the stock of a certain corporation after a favorable public vote on the question, such vote creates no contract with that corporation, and the municipality is not bound to issue bonds on tender of stock,<sup>1</sup> unless the law makes it the duty of the proper municipal officers to make the subscription and issue the bonds, when such vote is in favor of making the subscription.<sup>2</sup> When the subscription is once made, a *mandamus* will lie to compel the municipality to issue its bonds to pay for such subscription,<sup>3</sup> or to take steps to raise the money due therefor in accordance with the statute,<sup>4</sup> since such duty then becomes imperative.<sup>5</sup> The municipality may impose conditions to its subscription though the law authorizing the subscription is silent on the subject, and the relator must show compliance therewith before he can obtain a *mandamus* to compel the subscription or issue of the bonds.<sup>6</sup> A *mandamus* to compel the issuance of bonds in accordance with a subscription was refused, because the vote authorizing the subscription was taken before the proper papers were filed, which was contrary to the express provisions of the law.<sup>7</sup> A proposition of a railroad, when accepted by town officers, becomes a contract under the law allowing a subscription to such railroad, with a condition precedent that the voters vote for such proposition. If they affirm it, it becomes binding on both parties, and, upon a tender of the stock, a *mandamus* will

<sup>1</sup> Union P. R. R. v. Davis Co. (Com'rs), 6 Kans. 256; People v. Fort Edward (Trustees), 70 N. Y. 28; State v. Roscoe (Town), 25 Minn. 445.

<sup>2</sup> People v. Dutcher, 56 Ill. 144; People v. Waynesville (Town), 88 Ill. 469; People v. Glann, 70 Ill. 232; People v. Holden, 91 Ill. 446.

<sup>3</sup> Atchison, etc. R. R. v. Jefferson Co. (Com'rs), 12 Kans. 127.

<sup>4</sup> Clarke Co. (Just.) v. Paris, etc. Co., 11 B. Mon. 143.

<sup>5</sup> Cincinnati, etc. R. R. v. Clinton Co. (Com'rs), 1 Ohio St. 77; Osage Valley, etc. R. R. v. Morgan Co. (Co. Court), 53 Mo. 156.

<sup>6</sup> People v. Dutcher, 56 Ill. 144; People v. Waynesville (Town), 88 Ill. 469; People v. Glann, 70 Ill. 232; People v. Holden, 91 Ill. 446.

<sup>7</sup> Essex Co. R. R. v. Lunenburg (Town), 49 Vt. 143.



lie to compel the issue of the bonds.<sup>1</sup> An ordinance by a city, pursuant to express legislative authority, expressly obligated the city to issue its bonds to a railroad as bonus, if the railroad did certain things. A compliance by the railroad will create a binding obligation, and the city must issue its bonds, or it may be compelled to do so by *mandamus*.<sup>2</sup> But when a town is authorized to assist in building a railroad, its agreement to issue bonds therefor must be complete before the construction of the railroad, since it has no authority to assist a railroad already constructed.<sup>3</sup>

**§ 129. Mandamus to levy a tax to pay debts, when authority to make a levy is granted or is implied.**—When a municipal corporation has legally incurred a debt, which a court will never compel it to do,<sup>4</sup> justice requires that the debt should be paid; and when there are officers whose duty it is to see that such debts are paid, they will be required to exercise their powers for that purpose. Such powers generally consist of an authority to levy taxes to procure money for such payment. When an application is made for a *mandamus* to compel the levy of a tax to pay a debt, it must first be shown that the respondents have power under the law to levy a tax to pay the indebtedness in question, for an officer cannot be required by this writ to do any act not authorized by law. He can only levy a tax in the manner and to the amount prescribed by law.<sup>5</sup> It must be shown in each case that the officers have power to levy taxes to pay the claim in controversy before they will be ordered to make the levy. If the statute requiring the levy of a tax is itself void, there being no duty to levy a tax, a *mandamus* to compel a levy will be refused.<sup>6</sup> When a

<sup>1</sup> State v. Jennings, 48 Wis. 549.

<sup>2</sup> State v. Lake City, 25 Minn. 404.

<sup>3</sup> State v. Highland (Town), 25 Minn. 355.

<sup>4</sup> People v. Hyde Park, 117 Ill. 462.

<sup>5</sup> Sup'rs v. United States, 18 Wall. 71; State v. Rainey, 74 Mo. 229; Clay Co. v. McAleer, 115 U. S. 616; Coffin v. Davenport (City Council),

26 Iowa, 515; Polk v. Winett, 37 Iowa, 34; State v. Kennington, 10 Rich. (N. S.) 299; United States v. Macon County, 99 U. S. 582; Warren Co. (Sup'rs) v. Klein, 51 Miss. 807; Butz v. Muscatine (City), 8 Wall. 575.

<sup>6</sup> State v. Tappan, 29 Wis. 664.

municipal corporation has authority to create a debt or to incur an obligation to carry out any public object, or to spend a large sum of money on a variety of public works without any provision providing the means therefor, or to contract a debt by the issue of negotiable securities, such authorization implies and carries with it the power to adopt the ordinary means employed by such bodies to raise funds for the execution thereof, though the law authorizing the creation of the debt is silent on that subject, unless such funds are otherwise provided, or the law conveying the authority, or some general law in force at the time, clearly manifests a contrary intention; and the ordinary means in such cases is taxation.<sup>1</sup> Since the usual means of providing the funds is by taxation, a power to subscribe for railroad stock does not carry a power to issue bonds, but only a power to raise the money by taxation.<sup>2</sup> When the law under which the debt was created specifically provides that taxes shall be levied to pay the same, a *mandamus* will issue to compel the levy of the necessary tax. The writ has been issued to enforce the express provisions of the law in that respect, and to compel the levy of a tax to pay the expenses of constructing public buildings;<sup>3</sup> to pay for the construction of a harbor;<sup>4</sup> to build a school-house as requested by the electors of the town;<sup>5</sup> to create a fund to pay a certain indebtedness;<sup>6</sup> to raise the amount of money for educational purposes which the board of education had determined to be necessary;<sup>7</sup> to compel a sheriff, as required by an act of

<sup>1</sup> *United States v. New Orleans*, 98 U. S. 381; *United States v. Lincoln Co. (Just.)*, 5 Dill, 184; *Com. v. Allegheny (Com'rs)*, 37 Pa. St. 277; *State v. New Orleans (City)*, 34 La. An. 477; *Com. v. Allegheny (Com'rs)*, 43 Pa. St. 400; *Ralls Co. Ct. v. United States*, 105 U. S. 733; *Eufala (City Council) v. Hickman*, 57 Ala. 338.

<sup>2</sup> *Kelley v. Milan*, 127 U. S. 139; *Norton v. Dyersburg*, 127 U. S. 160.

<sup>3</sup> *Manor v. McCall*, 5 Ga. 522; *Tarver v. Tallapoosa (Com'rs Court)*, 17 Ala. 527; *Stevenson v. Summit (Dist. Town)*, 35 Iowa, 462.

<sup>4</sup> *State v. Milwaukee (City)*, 25 Wis. 122.

<sup>5</sup> *Cooper v. Nelson*, 38 Iowa, 440.

<sup>6</sup> *Wilkinson v. Cheatham*, 43 Ga. 258.

<sup>7</sup> *State v. Smith*, 11 Wis. 65.

the legislature, to levy a tax to pay a certain judgment;<sup>1</sup> to pay a judgment obtained in a federal court against a city;<sup>2</sup> to pay municipal bonds;<sup>3</sup> to pay interest on municipal bonds;<sup>4</sup> to pay the damages assessed for property taken for the opening of a street<sup>5</sup> or a highway,<sup>6</sup> and to pay the bounties promised to soldiers.<sup>7</sup> In some cases, where the liability of the municipality on its bonds was questioned, or the validity of the bonds themselves in law or in fact, or the validity of the claim for the payment whereof the levy and collection of a tax was provided, the courts, when from the showing made the question of liability appeared doubtful, have refused to issue the writ, till a judgment had been first obtained on the asserted obligation.<sup>8</sup> When it is made the duty of a county board of supervisors to raise a certain sum of money as other charges are levied and collected, it is incumbent on them to levy a tax for that purpose.<sup>9</sup>

**§ 130. Claims must be legally established before a mandamus will issue to compel the levy of a tax for their payment.**—Since this writ issues only to enforce plain duties, it will not go against a public board or officer to levy a tax to pay a certain claim, unless it is manifest that such claim is a legal charge, and that the amount thereof

<sup>1</sup> *Bassett v. Barbin*, 11 La. An. 672.

<sup>2</sup> *State v. Madison (City)*, 15 Wis. 30.

<sup>3</sup> *Com. v. Pittsburgh*, 88 Pa. St. 66; *United States v. Jefferson Co.*, 5 Dill. 310; *State v. Davenport (City)*, 12 Iowa, 335; *Flagg v. Palmyra (Town)*, 33 Mo. 440; *Morgan v. Com.*, 55 Pa. St. 456.

<sup>4</sup> *State v. Gates*, 22 Wis. 210; *Com. v. Pittsburgh (Select Council)*, 34 Pa. St. 499; *Meyer v. Porter*, 65 Cal. 67; *Pegram v. Cleveland Co. (Com'rs)*, 64 N. C. 557; *State v. Beloit (Sup'rs)*, 20 Wis. 79; *State v. New Orleans (City)*, 34 La. An. 477; *Columbia Co. (Com'rs) v. King*, 13

*Fla.* 451; *Williamsport (City) v. Com.*, 90 Pa. St. 498; *Maddox v. Graham*, 2 Metc. (Ky.) 56; *Robinson v. Butte Co. (Sup'rs)*, 43 Cal. 353; *State v. Clinton Co. (Com'rs)*, 6 Ohio St. 280.

<sup>5</sup> *State v. Keokuk (City)*, 9 Iowa, 438; *Higgins v. Chicago (City)*, 18 Ill. 276.

<sup>6</sup> *State v. Wilson*, 17 Wis. 687.

<sup>7</sup> *State v. Harris*, 17 Ohio St. 608.

<sup>8</sup> *Com. v. Pittsburgh (Select Council)*, 34 Pa. St. 496; *State v. Manitowoc (Mayor)*, 52 Wis. 423; *State Board of Education v. West Point*, 50 Miss. 638.

<sup>9</sup> *People v. Columbia Co. (Sup'rs)*, 10 Wend. 363.

has been so established that it cannot be legally controverted. The proof of the validity of such claim should be equivalent to a debt of record or the judgment of a court.<sup>1</sup> Unadjusted claims must first be audited and ordered to be paid.<sup>2</sup> If, however, the law under which a debt was contracted specially provides that a tax shall be levied for its payment, a *mandamus* will be granted for that purpose without the necessity of first adjudicating and auditing the claim.<sup>3</sup> Absolute and unconditional obligations, already ascertained and audited, are in themselves on their face an order and authority to the proper officer to pay them, and upon his refusal a *mandamus* will lie to compel the levy of a tax to pay them, if the public corporation meets its obligations by taxation.<sup>4</sup> Therefore a *mandamus* will issue to compel the levy of a tax to pay claims which have been allowed by the county commissioners<sup>5</sup> or by a township board.<sup>6</sup> For the same reason a *mandamus* lies to compel the levy of a tax to pay a judgment, which itself is a judicial auditing of a claim.<sup>7</sup> Ordinarily the writ will not lie to en-

<sup>1</sup> *Cabaniss v. Hill*, 74 Ga. 845; *Miss. 542*; *Warren Co. (Sup'rs) v. State v. McLeod Co. (Com'rs)*, 27 Minn. 90.

<sup>2</sup> *Leach v. Fayetteville (Com'rs)*, 84 N. C. 829; *State v. Clay Co.*, 46 Mo. 231; *Coy v. Lyons (City Council)*, 17 Iowa, 1; *Mansfield v. Fuller*, 50 Mo. 338; *School Dist. v. Bodenhamer*, 43 Ark. 140; *State Board Ed. v. West Point*, 50 Miss. 638.

<sup>3</sup> *State v. Pacific (Town Trustees)*, 61 Mo. 155; *Coy v. Lyons (City Council)*, 17 Iowa, 1; *State Board Ed. v. West Point*, 50 Miss. 638.

<sup>4</sup> *Leach v. Fayetteville (Com'rs)*, 84 N. C. 829.

<sup>5</sup> *Jefferson Co. v. Arrghi*, 51 Miss. 667; *Klein v. Smith Co. (Com'rs)*, 54 Miss. 254; *Rodman v. Larue Co. (Just.)*, 3 Bush, 144; *People v. Livingston Co. (Sup'rs)*, 68 N. Y. 114; *Beard v. Lee Co. (Sup'rs)*, 51

*Miss. 542*; *Warren Co. (Sup'rs) v. Klein*, 51 Miss. 807; *Police Board v. Grant*, 9 Sm. & M. 77. *Contra*, *People v. Clark Co. (Sup'rs)*, 50 Ill. 213.

<sup>6</sup> *Sievenson v. Summit (Dist. Town)*, 35 Iowa, 462; *Hosier v. Higgins Town Board*, 45 Mich. 340; *State v. Perrysburg Township (Board of Educ.)*, 27 Ohio St. 96. *Contra*, *State v. Pacific (Town Trustees)*, 61 Mo. 155.

<sup>7</sup> *State v. Johnson Co. (Board of Equal.)*, 10 Iowa, 157; *Cromartie v. Bladen (Com'rs)*, 85 N. C. 211; *People v. San Francisco (Sup'rs)*, 21 Cal. 668; *Dearing v. Shepherd*, 78 Ga. 28; *Gooch v. Gregory*, 65 N. C. 142; *Lutterloh v. Cumberland Co. (Com'rs)*, 65 N. C. 403; *George's Creek, etc. Co. v. Allegany Co. (Com'rs)*, 59 Md. 255; *Palmer v.*

force a judgment, but it lies against a public corporation, since there is no other remedy, either because an execution is not allowed by law,<sup>1</sup> or it has been returned *nulla bona*.<sup>2</sup> It must, however, appear that the proper officers have power to levy taxes;<sup>3</sup> otherwise the writ will be refused.<sup>4</sup> Also, to prevent a failure of justice, a writ of *mandamus* will issue to compel the levy of a tax to pay a claim on which a suit cannot be brought;<sup>5</sup> as when the relator has a claim only on a special fund, which is in the custody of the county court, in which case the writ will issue to audit and pay or provide for the payment of such claim.<sup>6</sup>

§ 131. In a *mandamus* on a judgment is the latter conclusive?—Upon an application for a *mandamus* to compel the levy of a tax to pay a judgment, it is too late to urge that the relator was not entitled to his judgment,<sup>7</sup> that the municipality has no power to levy the tax demanded,<sup>8</sup> or that the coupons sued on were invalid: such objections must be urged before a judgment is obtained. So defenses, which were urged in the suit in which the judgment was obtained, cannot be urged again in a *mandamus* proceeding to compel the payment of the judgment.<sup>9</sup> When, however,

Stacy, 44 Iowa, 340; State v. Gates, 22 Wis. 210; Coy v. Lyons (City Council), 17 Iowa, 1; Huntington v. Smith, 25 Ind. 486; Boynton v. Newton (Dist. Town), 34 Iowa, 510; Butz v. Muscatine (City), 8 Wall. 575; United States v. Buchanan Co., 5 Dill. 285; United States v. Sterling (City), 2 Biss. 408; United States v. Galena (City), 10 Biss. 263; Olney (City) v. Harvey, 50 Ill. 453; State v. Milwaukee (Com. Council), 20 Wis. 87; Galena (City) v. Amy, 5 Wall. 705; Norris v. Baltimore (City), 44 Md. 598.

<sup>1</sup> Duncan v. Louisville (City), 8 Bush. 98; Olney (City) v. Harvey, 50 Ill. 453; Hughes v. Craven Co. (Com'rs), 107 N. C. 598.

<sup>2</sup> Fisher v. Charleston (City), 17 W. Va. 595; Britton v. Platte City, 2 Dill. 1; Fisher v. Charleston (Mayor), 17 W. Va. 628.

<sup>3</sup> State v. Milwaukee (City), 20 Wis. 87.

<sup>4</sup> State v. Maysville, 12 S. C. 76.

<sup>5</sup> Klein v. Smith Co. (Sup'rs), 54 Miss. 254.

<sup>6</sup> Mansfield v. Fuller, 50 Mo. 338; State v. Bollinger Co. (Just.), 48 Mo. 475.

<sup>7</sup> State v. Gates, 22 Wis. 210.

<sup>8</sup> United States v. New Orleans, 98 U. S. 381; Ralls Co. Court v. United States, 105 U. S. 733.

<sup>9</sup> City v. Sansum, 87 Ill. 182.

a party asks for a *mandamus* to enforce the payment of his judgment against a municipality on coupons cut from its bonds, and is compelled to go behind his judgment in order to obtain the remedy pertaining to the bonds, the court cannot decline to take cognizance of the fact that the bonds are utterly void, and will be compelled to refuse the writ to make the officers levy a tax to pay coupons cut from those bonds, since the writ cannot confer any authority on the taxing officers in addition to what they had before.<sup>1</sup>

**§ 132. In a mandamus to levy a tax to pay a demand, public necessities must be first considered.**—In ordering the payment of, or the levy of, a tax to pay a claim, the courts will not allow public interests to suffer in order to protect a private interest: when they conflict, the latter will be compelled to yield. A *mandamus* will not be issued to compel a municipal corporation to pay a claim, when the funds on hand are required for its ordinary and necessary expenses, and the diversion thereof would tend to disorganize and disrupt such municipality;<sup>2</sup> but the municipality may be ordered to pay over to the relator its surplus,<sup>3</sup> or the surplus arising from year to year, and it may be enjoined from spending any money except for its ordinary current expenses.<sup>4</sup> When a municipal corporation is called upon to levy a tax to pay a claim against it, and its power of taxation is limited as to the amount of tax it can levy, the proceeds of such taxation will be first applied to the payment of its ordinary and necessary expenses;<sup>5</sup> and it is a sufficient reply to an application for such a *mandamus*, that all the money that can be so raised is absolutely required for such expenses.<sup>6</sup> When a debt is payable out of

<sup>1</sup> *Brownsville v. Loague*, 129 U. S. 493.

<sup>2</sup> *Williamsport (City) v. Com.*, 90 Pa. St. 498; *State v. Macon Co. Court*, 68 Mo. 29; *Grant v. Davenport (City)*, 36 Iowa, 396.

<sup>3</sup> *State v. Shreveport (City)*, 29 La. An. 658.

<sup>4</sup> *Corpus Christi (City) v. Woessner*, 58 Tex. 462.

<sup>5</sup> *Von Hoffman v. Quincy (City)*, 4 Wall. 535; *Coffin v. Davenport (City Council)*, 26 Iowa, 515.

<sup>6</sup> *Clay Co. v. McAleer*, 115 U. S. 616; *Coffin v. Davenport (City Council)*, 26 Iowa, 515; *Cromartie v. Bladen (Com'rs)*, 85 N. C. 211.

the yearly income of a municipality, the court may require the return to show what the income is, and how it is expended, since the court will allow none of it to be employed for other than ordinary purposes so long as creditors have a claim thereto.<sup>1</sup> If it appears that the property of the municipality is undervalued in the assessment, the court will order the tax to be levied.<sup>2</sup> When a levy is ordered in order to pay a certain demand, it is not sufficient to make a general levy which includes the amount of such demand, but there must be a special levy to pay that particular demand, and the proceeds of the levy must be set apart to discharge the claim.<sup>3</sup> When a municipality is not authorized to levy a tax sufficient to discharge a claim in full, the court will order it to pay a proportion thereof each year, and to levy a tax sufficient for that purpose, and will not require the relator to bring successive actions for a *mandamus*.<sup>4</sup> When the proper officers knowingly levy a tax insufficient to discharge a claim, they may be compelled by *mandamus* to make a larger levy.<sup>5</sup> If the levy has been made and the proper officer is proceeding in the collection thereof with such dispatch as the law requires and permits, the relator cannot complain.<sup>6</sup> Should the tax not produce a sufficient amount to pay the claim as ordered, the relator is not compelled to wait till the balance can be collected from delinquents, but may apply for another *mandamus*.<sup>7</sup>

**§ 133. Mandamus to collectors of revenue.**— A *mandamus* is the more efficient and appropriate remedy to com-

<sup>1</sup> Beaulieu v. Pleasant Hill (City), 4 McCrary, 554.

<sup>2</sup> Coffin v. Davenport (City Council), 26 Iowa, 515.

<sup>3</sup> State v. Davenport (City), 12 Iowa, 335.

<sup>4</sup> Coy v. Lyons (City Council), 17 Iowa, 1; Coffin v. Davenport (City Council), 26 Iowa, 515; United States v. Galena (City), 10 Biss. 263; State v. Weir (Neb., Sept. 22, 1891), 49 N. W. Rep. 785.

<sup>5</sup> Robinson v. Butte Co. (Sup'rs), 43 Cal. 353.

<sup>6</sup> State v. Davenport (City), 12 Iowa, 335.

<sup>7</sup> Fisher v. Charleston (City), 17 W. Va. 595; Fisher v. Charleston (Mayor), 17 W. Va. 628. It has been held that the relator must first proceed against the tax collector to compel him to collect all of the tax already levied. Duperier v. Iberia Parish (Police Jury), 31 La. An. 709.

pel collectors of public revenue to proceed to perform their duty.<sup>1</sup> It lies to compel a tax collector to make to a purchaser at a tax sale a deed to the land sold;<sup>2</sup> but if such deed is based on an irregular assessment and will convey no title, the writ will be refused.<sup>3</sup> When, however, the act sought is not an official duty, its performance will not be enforced by a *mandamus*. When a county collector of taxes is allowed a percentage on the delinquent taxes collected, which does not go into the county treasury, and with which he is not charged, the county auditor cannot be required, at the relation of his predecessor, to draw a warrant on him for such percentage belonging to such predecessor, but collected by him. The proper remedy is for the predecessor to bring suit against him for the money so collected.<sup>4</sup>

### § 134. Mandamus to obtain possession of public funds.

An officer, who is entitled to the possession of public funds which are in the custody of another officer, may obtain them by the writ of *mandamus*.<sup>5</sup> The writ has been issued: to compel a tax collector to pay money into the public treasury, when he failed to do so within the time allowed him by law;<sup>6</sup> to compel a county treasurer to pay to the proper local officers the amount of liquor taxes to which they were entitled by law;<sup>7</sup> to compel a town treasurer to pay township library funds to the treasurer of the board of school inspectors;<sup>8</sup> to compel a county treasurer to pay to the township officers the money raised by taxation for its use;<sup>9</sup> to compel a county treasurer to pay over money in his hands collected for and belonging to the treasurer of a

<sup>1</sup> State v. Whitworth, 8 Lea, 594.

<sup>2</sup> State v. Mantz, 62 Mo. 258; Kidder v. Morse, 26 Vt. 74.

<sup>3</sup> Bosworth v. Webster, 64 Cal. 1.

<sup>4</sup> Thomas v. Hamilton Co. (Auditor), 6 Ohio St. 113.

<sup>5</sup> Hon v. State, 89 Ind. 249.

<sup>6</sup> People v. Austin, 46 Cal. 520. Where another remedy was pro-

vided by law, the writ was refused.

State v. Boulton, 26 La. An. 259.

<sup>7</sup> East Saginaw v. Saginaw Co. Treas., 44 Mich. 273.

<sup>8</sup> People v. Mahoney, 30 Mich. 100.

<sup>9</sup> Cass Township v. Dillon, 16 Ohio St. 38; State v. Hoeflinger, 31 Wis. 257.



district school board;<sup>1</sup> to compel the collectors of the taxes of different wards to pay to the trustees of the public schools all the money raised by taxation for such purposes;<sup>2</sup> to compel the trustee of a township to pay over to the school trustees of a town, incorporated out of a part thereof, its proportion of the school funds raised by taxation;<sup>3</sup> and to compel a tax collector to pay the taxes, collected to make payments on bonds issued in aid of a railroad, to the railroad commissioners of the town.<sup>4</sup> Though the officer has already paid the funds to the wrong officer, yet a *mandamus* will run against him, although he has by his action exposed himself to loss or made his duty difficult or inconvenient.<sup>5</sup>

**§ 135. Mandamus to disbursing officers.**—A writ of *mandamus* will lie to compel a public disbursing officer to pay accounts out of the public funds in his hands, when such accounts have been allowed by the proper officers or tribunals, and no duty devolves upon him except the ministerial duty of making the payment.<sup>6</sup> When, however, such disbursing officer refuses to pay such accounts believing them to be illegal, or that the auditing officers had no jurisdiction in the matter, the court on an application for a *mandamus* to compel payment will investigate the subject as to the legality or jurisdiction but not as to the amount of the allowance, and will refuse the application if the ground of objection is proven to be correct.<sup>7</sup> When such disbursing officer has no funds on hand applicable to claims

<sup>1</sup> State v. Burkhardt, 59 Mo. 75.

<sup>2</sup> State v. Hammell, 31 N. J. L. 446.

<sup>3</sup> Johnson v. Smith, 64 Ind. 275.

<sup>4</sup> People v. Brown, 55 N. Y. 180.

<sup>5</sup> People v. Brown, 55 N. Y. 180.

<sup>6</sup> Johnson v. Campbell, 39 Tex. 83; Thomas v. Smith, 1 Mont. 21; State v. Callaway Co. (Treas.), 43 Mo. 228; Day v. Callow, 39 Cal. 593; People v. Johnson, 100 Ill. 537; People v. Edmonds, 15 Barb. 529; People v. Edmonds, 19 Barb. 468; People v.

Lawrence, 6 Hill, 244; Com. v. Johnson, 2 Binn. 275; Hendricks v. Johnson, 45 Miss. 644; Keller v. Hyde, 20 Cal. 593; State v. Earle, 42 N. J. L. 94; Baker v. Johnson, 41 Me. 15; People v. Palmer, 52 N. Y. 83; State v. Gandy, 12 Neb. 232; Huff v. Knapp, 5 N. Y. 65; Q. v. Oswestry (Treas.), 12 Q. B. 239; Needham v. Thresher, 49 Cal. 392. See § 103.

<sup>7</sup> State v. Callaway Co. (Treas.), 43 Mo. 228; People v. Lawrence, 6

of the nature of that for which payment is sought, and it so appears by the officer's return, the writ of *mandamus* to compel payment will be refused.<sup>1</sup> He will not be ordered to pay the claim out of moneys subsequently coming to his hands, because he is not at the time derelict in his duty and not amenable to the writ.<sup>2</sup> Where, however, the officer has erroneously paid out the money on warrants not properly chargeable to that fund,<sup>3</sup> or the money has been improperly transferred on his books to another fund,<sup>4</sup> the writ will issue, and he may be required to correct his books accordingly; the writ may issue for the express purpose alone of compelling a transfer of funds from one account to another on the books of a disbursing officer.<sup>5</sup> When with a view to an allowance of interest the law requires a treasurer, who fails to pay a warrant for lack of funds, to make an indorsement on the warrant of that fact, he may be required by the writ of *mandamus* to perform that duty.<sup>6</sup> If any duty devolves on the officer besides payment, as if he must first determine the validity of the claim, the writ of *mandamus* will not lie to compel him to pay the claim. He may require it to be adjudicated first.<sup>7</sup> When a salary is fixed by law, it need not be adjudicated or audited.<sup>8</sup> Though a city may be liable for the damages sustained while it hesitates whether to abandon condemnation proceedings or to pay the damages assessed, yet a *mandamus* will not lie to compel the payment of such damages till they have been ascertained and a judgment rendered therefor.<sup>9</sup> When the

Hill, 244; Keller v. Hyde, 20 Cal. 593; People v. Wendell, 71 N. Y. 171; State v. Hastings, 10 Wis. 518.

<sup>1</sup> People v. Stout, 23 Barb. 338; People v. Frink, 32 Mich. 96; State v. Smith, 8 S. C. 127; Mitchell v. Speer, 39 Ga. 56; Day v. Callow, 39 Cal. 593.

<sup>2</sup> Day v. Callow, 39 Cal. 593.

<sup>3</sup> People v. Stout, 23 Barb. 338.

<sup>4</sup> State v. Union (Town Council)

52 N. J. L. 69; Rice v. Walker, 44 Iowa, 458; Williamsport (City) v. Com., 90 Pa. St. 498.

<sup>5</sup> State v. Stone, 69 Ala. 206.

<sup>6</sup> Needham v. Thresher, 49 Cal. 392.

<sup>7</sup> State v. Snodgrass, 98 Ind. 546.

<sup>8</sup> State v. Starling, 13 S. C. 263. See § 105.

<sup>9</sup> Norris v. Baltimore (City), 44 Md. 598.

statute contains the conditions for payment out of a certain fund, such payment may be enforced by *mandamus*.<sup>1</sup> When a municipal charter makes it the duty of the treasurer to pay the interest on certain bonds, as it falls due, out of a fund provided for that purpose, a *mandamus* lies to compel such payment.<sup>2</sup> When the legislature, having the power, appropriates money to pay for work of public necessity which was done under an invalid contract, a disbursing officer cannot object that the state was not bound to pay, or that the legislature was not fully informed, and refuse to pay, and a *mandamus* will issue to compel him to make payment.<sup>3</sup> It is the ministerial duty of a county treasurer, which may be enforced by *mandamus*, to pay a judgment against the county, when the board of supervisors of the county have resolved not to appeal.<sup>4</sup> This writ has been issued to a county treasurer: to sell land for delinquent taxes and to give the purchaser a receipt for the money paid by him;<sup>5</sup> to pay out to the proper person money for the particular purpose for which the legislature gave it to the county;<sup>6</sup> to issue his warrant for the collection of a tax;<sup>7</sup> to assign the certificate of sale of land for taxes;<sup>8</sup> to pay over to a judgment creditor the money collected to pay his judgment,<sup>9</sup> and to pay to a purchaser of land at a tax sale on redemption thereof such money as was received by him at such redemption.<sup>10</sup> The writ has been issued to the treasurer of a town: to issue his warrant of distress against a collector of taxes for neglecting to collect a school district tax,<sup>11</sup> and to pay it over in the time fixed in the assessor's warrant;<sup>12</sup> to a school fund commissioner to pay over money declared by judgment to be due to the re-

<sup>1</sup> Sessions v. Boykin, 78 Ala. 328.

<sup>2</sup> Meyer v. Porter, 65 Cal. 67.

<sup>3</sup> People v. Schuyler, 79 N. Y. 189.

<sup>4</sup> Bank of California v. Shaber, 55 Cal. 322.

<sup>5</sup> State v. Helmer, 10 Neb. 25.

<sup>6</sup> Pike Co. (Com'rs) v. People, 11 Ill. 202.

<sup>7</sup> People v. Halsey, 37 N. Y. 344.

<sup>8</sup> State v. Bowker, 4 Kans. 114; State v. Magill, 4 Kans. 415.

<sup>9</sup> Brown v. Crego, 32 Iowa, 498.

<sup>10</sup> Murphy v. Smith, 49 Ark. 37.

<sup>11</sup> Tremont School Dist. v. Clark, 33 Me. 482.

<sup>12</sup> Waldron v. Lee, 5 Pick. 323.

lator out of funds in his possession;<sup>1</sup> and to a town treasurer to deliver bonds to water commissioners whose duty it was to sell them and who were entitled to their custody.<sup>2</sup> The writ of *mandamus* has been refused: to compel loan commissioners to pay certain bonds in gold coin, when the only funds in their hands for that purpose were legal tender notes;<sup>3</sup> to compel a county treasurer to pay certain county orders, when other older county orders remained unpaid, which would exhaust all the money in his hands and which by law were payable before those in suit;<sup>4</sup> to compel the payment of a claim from a certain assessment fund, when, in a suit brought by a tax-payer to recover the portion of such fund paid by him under a levy, the assessment was declared to be invalid;<sup>5</sup> to a city auditor to pay claims prior to their audit and approval by the city council as required by ordinance;<sup>6</sup> and to compel a county treasurer to pay a claim, when he had in good faith, before the issue of the alternative writ, paid over all the funds in his hands to his successor in office.<sup>7</sup> In accordance with a firmly established principle, when from extraneous circumstances a well-founded doubt arises, either to as to the right of the applicant to receive or of the officer to pay, the *mandamus* will be refused.<sup>8</sup> In some cases the writ has been refused, though we believe contrary to the weight of authority, because an action would lie on the officer's bond for neglect of duty,<sup>9</sup> or because he rendered himself, by such refusal to do his duty, liable to attachment or indictment.<sup>10</sup>

### § 136. Mandamus concerning the payment of salaries.

This writ is the appropriate remedy to compel a municipal

<sup>1</sup> Hillis v. Ryan, 4 G. Greene, 78.

<sup>7</sup> State v. Lynch, 8 Ohio St. 347.

<sup>2</sup> Pearsons v. Ranlett, 110 Mass. 118.

<sup>8</sup> People v. Johnson, 100 Ill. 537.

<sup>3</sup> People v. Cook, 39 Cal. 658.

<sup>9</sup> State v. Bridgman, 8 Kans. 458;

<sup>4</sup> Mitchell v. Speer, 39 Ga. 56.

State v. McCrillas, 4 Kans. 250.

<sup>5</sup> People v. East Saginaw, 40 Mich. 336.

*Contra*, Sessions v. Boykin, 78 Ala. 328.

<sup>10</sup> King v. Surrey (Treas.), 1 Chit. 650.

<sup>6</sup> Dubordieu v. Butler, 49 Cal. 512.

corporation, or an officer thereof, to audit the account of a public officer for his salary, or to draw a warrant therefor, or to pay such a warrant.<sup>1</sup> It is considered that it would be a great hardship to compel a public officer to bring suit for his salary.<sup>2</sup> When such salary is fixed by law, it is not necessary to audit it, since the auditing officers have no discretion to allow or reject it.<sup>3</sup> Some courts, ignoring the delay, expense and uncertainty as to results, have refused the writ in such cases, because the object of the writ is to obtain money, and the same object might be attained by a suit against the municipality or on the bond of the delinquent officer.<sup>4</sup> Such decisions controvert the proposition, that, when a claim has been allowed by the proper authority, the duty of an auditing officer to draw a warrant therefor is merely a ministerial duty, which will be enforced by a *mandamus*;<sup>5</sup> and it controverts the proposition that, when accounts have been allowed by the proper officers or tribunals, the duty of payment by a public disbursing officer is merely ministerial, and that a *mandamus* will lie to compel the performance of such duty.<sup>6</sup> .

<sup>1</sup> Huff v. Knapp, 5 N. Y. 65.

State v. Hannon, 38 Kans. 593;

<sup>2</sup> McBride v. Grand Rapids (City),  
47 Mich. 236.

People v. New York (Mayor), 25  
Wend. 680; People v. Thompson,

<sup>3</sup> State v. Starling, 13 S. C. 262.

25 Barb. 73. See § 17.

<sup>4</sup> State v. Lincoln (Mayor), 4 Neb.  
260; Lynch, Ex parte, 2 Hill, 45;

<sup>5</sup> See § 126.

<sup>6</sup> See § 135.

## CHAPTER 11.

### THE USE OF MANDAMUS, WHEN THE RIGHT TO A PUBLIC OFFICE OR TO MEMBERSHIP, OR TO AN OFFICE, IN A PUBLIC CORPORATION, IS CONCERNED.

- § 137. Right to disfranchise a member of a public corporation.
- 138. *Mandamus* to order elections.
- 139. *Mandamus* to count the votes cast at an election.
- 140. *Mandamus* to canvassing boards to issue a certificate of election.
- 141. *Mandamus* to swear an officer elect into office.
- 142. *Mandamus* in favor of one holding the certificate of election.
- 143. *Mandamus* to put into office not granted, when there is a *de facto* incumbent.
- 144. Whether *mandamus* lies to put one into office pending a contest.
- 145. *Mandamus* to compel an officer elect to assume the duties of the office.
- 146. *Mandamus* is allowed in some states to try the title to an office.
- 147. When a public officer may be removed from an office.
- 148. *Mandamus* lies to restore an officer wrongfully removed from office.
- 149. *Mandamus* will not lie to seat an officer who may be removed at once.
- 150. *Mandamus* when an officer not removed but another party intrudes himself.
- 151. *Mandamus* when removal from office is discretionary.
- 152. Party having the *prima facie* title to an office can enforce his rights as such officer by the writ of *mandamus*.
- 153. Subject continued.
- 154. *Mandamus* for books and paraphernalia of office by party with the *prima facie* title.
- 155. Subject continued.
- 156. *Mandamus* not lie to private individual to surrender office books, etc.

**§ 137. Right to disfranchise a member of a public corporation.**—The writ of *mandamus* has often been resorted to in order to determine the right to hold a public office,

or to hold a membership, or an office, in a public corporation. It was decided in an early case, that no freeman of any corporation could be disfranchised by the corporation, unless such power was given to it by express words in its charter, or was authorized by prescription, except in the case of conviction of a felony in a court of law.<sup>1</sup> In America no such question seems ever to have been raised.<sup>2</sup> In England such power has been claimed. If, however, the disfranchisement is wrongful, the party may be restored to his membership by the writ of *mandamus*.<sup>3</sup> So when a person has a right to be admitted to the freedom of a public corporation, he may resort to this writ;<sup>4</sup> but he cannot avail himself of such assistance, unless the duty of admission is imperative on the corporate officers.<sup>5</sup> Though the words disfranchisement and amotion are often used interchangeably, disfranchisement properly refers to a removal from membership in a corporation, and amotion only to a removal from an office, leaving the membership unaffected.

§ 138. **Mandamus to order elections.**—Boards or officers, whose duty it is to order elections, whether the law requires them to order elections at a certain time,<sup>6</sup> or to fill vacancies which have occurred in offices,<sup>7</sup> may by *mandamus* be forced to discharge this duty. If, however, an election has been held and its validity is a doubtful question,<sup>8</sup> or there is already a *de facto* incumbent, the writ will be re-

<sup>1</sup> Bagg's Case, 11 Coke, 93; King v. Doncaster (Mayor), 2 Ld. Raym. 1564.

<sup>2</sup> Com. v. Guardians of the Poor, 6 S. & R. 469, may be such a case, but from the report it seems uncertain whether the corporation was a public one and whether the relator had been disfranchised or removed from an office.

<sup>3</sup> Middleton's Case, Dyer, 333.

<sup>4</sup> Townsend's Case, 1 Lev. 91.

<sup>5</sup> Rex v. Eye (Bailliffs), 1 B. & C. 85.

<sup>6</sup> Gibbs v. Bartlett, 63 Cal. 117; McConihe v. State, 17 Fla. 238; Reg. v. Bradford (Mayor), 4 Eng. L. & E. 194.

<sup>7</sup> State v. Rahway (Com. Council), 33 N. J. L. 110; R. v. Wigan (Corp.), 2 Burr. 782; King v. Grampond, 6 T. R. 301.

<sup>8</sup> Rex v. Oxford, 6 A. & E. 349; Frost v. Chester (Mayor), 5 El. & Bl. 531; Rex v. Bankes, 3 Burr. 1452; State v. Dunn, 1 Minor (Ala.), 46; Com. v. Co. Com'rs, 5 Rawle, 45.

fused.<sup>1</sup> In such cases the writ is refused, because there is another remedy by *quo warranto* to oust the incumbent.<sup>2</sup> When, however, there is no other way to decide the right to the office, the writ will be granted.<sup>3</sup> The writ, ordering a new election, will also be granted when it is plain that such prior election was merely colorable and void;<sup>4</sup> and it has been granted when it was plain that the person already elected was not qualified for the office, but it was not issued till, on a rule to show cause why he should not appear to be sworn into office, he had made return admitting his ineligibility.<sup>5</sup>

§ 139. **Mandamus to canvass the votes cast at an election.**— When the proper officers refuse to canvass the votes cast at an election, a *mandamus* will lie to compel them to do so,<sup>6</sup> and if an ordinance is first necessary, a city council will be required to pass such an ordinance.<sup>7</sup>

§ 140. **Mandamus to canvassing boards to issue a certificate of election.**— A *mandamus* will lie to compel the canvassing officers to issue a certificate of election to a person who was duly elected to an office, though another person may have received the certificate and may be in possession of the office.<sup>8</sup> Such action does not determine the right to the office, but puts the party in a position to assert his rights, which in some cases otherwise he could not do, and a *quo warranto* may still be necessary to oust the incumbent.<sup>9</sup> Where, however, a *quo warranto* would still be

<sup>1</sup> Q. v. St. Martins (Guar. of Poor), 17 Ad. & E. (N. S.) 149; State v. Dunn, 1 Minor (Ala.), 46.

<sup>2</sup> Rex v. Oxford, 6 A. & E. 349; Frost v. Chester (Mayor), 5 El. & Bl. 531.

<sup>3</sup> Q. v. St. Martins (Guar. of Poor), 17 Ad. & E. (N. S.) 149.

<sup>4</sup> Rex v. Oxford, 6 A. & E. 349; Frost v. Chester (Mayor), 5 El. & Bl. 531; Rex v. Stoke-Damere (Minister), 5 A. & E. 584; Rex v. Cambridge (Mayor), 4 Burr. 2008; Rex v. Bankes, 3 Burr. 145.; Buller's Nisi Prius, 197, 198.

<sup>5</sup> King v. Bedford (Corp.), 1 East, 79.

<sup>6</sup> Q. v. Leeds (Mayor), 11 Ad. & E. 512.

<sup>7</sup> Darrow v. People, 8 Colo. 417.

<sup>8</sup> People v. Rives, 27 Ill. 242; State v. Williams, 99 Mo. 291; French v. Cowan, 79 Me. 426; State v. Newman, 91 Mo. 445; Strong, Petitioner, 20 Pick. 484; Ellis v. Bristol (Co. Com'rs), 2 Gray, 370.

<sup>9</sup> Ellis v. Bristol (Co. Com'rs), 2 Gray, 370; Strong, Petitioner, 20 Pick. 484; People v. Hilliard, 29 Ill. 413.



required, and under their laws nothing would be attained by the issue of the writ, it has been refused.<sup>1</sup> If the board or tribunal has by law the power to determine all questions as to the election and the returns and the qualifications of the candidates, under the general rule that the action of a body possessing deliberative functions cannot be reviewed by *mandamus*, such body cannot be required to grant a certificate of election to a person, nor to admit him to the office, when it has already decided adversely to his claims.<sup>2</sup>

**§ 141. Mandamus to swear an officer elect into office.**— So this writ may be used to compel the proper officers to swear into office one who has been properly elected or appointed thereto;<sup>3</sup> but it will not lie in the case of an officer against whom a judgment of ouster has been given, since such judgment is a bar to such an application so long as it is in force.<sup>4</sup>

**§ 142. Mandamus in favor of one holding the certificate of election.**— A person who has the commission for or the proper certificate of election to an office, has the *prima facie* right to the office,<sup>5</sup> and he may resort to a *mandamus* to enforce his rights in connection therewith. Such evidence of title can only be called in question in a direct proceeding to determine the right to the office by *quo warranto* or in a contest for the office.<sup>6</sup> When a person has been duly elected or appointed to an office, he may use this remedy to obtain admission to such office, when admission has been refused by those having authority in the matter.<sup>7</sup>

<sup>1</sup> *Sherburne v. Horn*, 45 Mich. 160; *State v. Rodman*, 43 Mo. 254. *People v. Hilliard*, 29 Ill. 413; *State v. Dusman*, 39 N. J. L. 677.

<sup>2</sup> *Vicksburg (Mayor) v. Rainwater*, 47 Miss. 547; *Peabody v. Boston (School Com.)*, 115 Mass. 383; *King v. London (Mayor)*, 3 B. & Ad. 255. <sup>6</sup> *State v. Camden Co. (Chosen Freeholders)*, 35 N. J. L. 217; *State v. Warrick Co. (Com'rs)*, 124 Ind. 554; *State v. Saxon*, 25 Fla. 792; *Driscoll v. Jones (S Dak., Mar. 1, 1890)*, 44 N. W. Rep. 726. *Contra*, *Pucket v. Bean*, 11 Heisk. 600.

<sup>3</sup> *King and Knapton*, 2 Keb. 445; *King v. Bedford Level*, 6 East, 356; *King v. Bedford*, 1 East, 79; *Rex v. Ward*, 2 Stra. 893. <sup>7</sup> *Felts v. Memphis (Mayor)*, 2 Head, 650; *Burr v. Norton*, 25 Conn. 103; *Chumasero v. Potts*, 2 Mont. 242.

<sup>4</sup> *King v. Serle*, 8 Mod. 332.

<sup>5</sup> *Warner v. Myers*, 4 Oreg. 72;

So a person, who has been elected to a membership in a board, may compel the other members to recognize him as a member thereof, and to admit him to their deliberations.<sup>1</sup> If, however, there is already a *de facto* incumbent of the office, in those states where the courts refuse to try the title to an office by this writ, it cannot be resorted to in order to obtain the office itself.<sup>2</sup> However it is a common practice to grant the writ to the party holding the commission or certificate therefor, to enable him to obtain the books, papers or insignia of office, or the possession of property or buildings properly in the custody of such officer, or to enable him to enforce other rights growing out of his official position.<sup>3</sup>

**§ 143. Mandamus to put into office not granted when there is a *de facto* incumbent.**—When there is a party already in possession of the office, holding it under color of right, the courts will refuse to issue the writ, and will require the party to resort to a *quo warranto* first in order to determine the right of the incumbent.<sup>4</sup> They refuse to allow this writ to be used to try the title to an office. The reasons for this ruling are, because *mandamus* never lies

<sup>1</sup> *Q. v. Leeds* (Mayor), 11 A. & E. 512; *Lawrence v. Ingersol*, 88 Tenn. 52; *Smith v. Eaton Co.* (Sup'rs), 56 Mich. 217; *Douglas v. Essex Co.* (Chosen Freeholders), 38 N. J. L. 214.

<sup>2</sup> See § 143.

<sup>3</sup> See §§ 152, 153, 154, 155.

<sup>4</sup> *Lusk, Ex parte*, 82 Ala. 519; *State v. Steen*, 43 N. J. L. 542; *Mannix v. State*, 115 Ind. 245; *State v. Palmer*, 10 Neb. 203; *Biggs v. McBride*, 17 Oreg. 640; *People v. Detroit* (Com. Council), 18 Mich. 338; *State v. Thompson*, 36 Mo. 70; *State v. Sherwood*, 15 Minn. 221; *People v. Olds*, 3 Cal. 167; *State v. Dusman*, 39 N. J. L. 677; *State v. Draper*, 48 Mo. 213; *State v. Camden* (Com. Council), 42 N. J. L. 335;

*French v. Cowan*, 79 Me. 426; *State v. Gasconade Co. Court*, 25 Mo. Ap. 446; *State v. Taaffe*, 25 Mo. Ap. 567; *People v. New York*, 3 John. Cas. 79; *Bonner v. State*, 7 Ga. 473; *Q. v. Derby* (Councillors of Borough), 7 A. & E. 419; *Moiles v. Watson*, 60 Mich. 415; *Harris, Ex parte*, 52 Ala. 87; 3 *Stephens' Nisi Prius*, 2295; *Denver v. Hobart*, 10 Nev. 28; *Meredith v. Supervisors*, 50 Cal. 433; *King v. Colchester* (Mayor), 2 T. R. 260; *People v. Matteson*, 17 Ill. 167; *Swartz v. Large* (Kan., Nov. 7, 1891), 27 Pac. Rep. 992; *Frey v. Michie*, 68 Mich. 323; *Runion v. Latimer*, 6 S. C. 126; *R. v. Winchester*, 7 A. & E. 215; *R. v. Atwood*, 4 B. & Ad. 481; *R. v. Chester*, 1 M. & S. 101.

when there is another adequate remedy, which *quo warranto* is considered to be, and because justice requires that the incumbent should be a party to the proceeding in order to protect his own rights, whereas the writ is often brought against other parties, ignoring the real party in interest.<sup>1</sup> This ruling is only one of discretion, and will not be allowed to prevent the issue of a *mandamus* in such cases when the law has provided no other remedy.<sup>2</sup> In England an office is full *de facto* when the person elected has been admitted to it, whether the election was or was not of such a character that it could be supported at law, but such illegality must be consistent with honesty of purpose. Elections based upon mistakes of fact or misconceptions of law may import a color of right, which will bar the allowance of a *mandamus*, but palpable disregard of law renders the action by which the office is seized merely colorable, and in a clear case will be brushed aside as affording no obstruction to the exercise of a plain legal duty. In such cases a party ousted wrongfully may have a *mandamus*.<sup>3</sup> If the office is not filled, or there is no adverse claimant holding under color of right, there is no reason why the writ should not issue.<sup>4</sup> So the writ will issue if the incumbents are only holding over till their successors are elected and qualified,<sup>5</sup> or if they are holding the offices by virtue of an election or an appointment which is merely colorable and void,<sup>6</sup> or if the relator's title has been finally established by a competent tribunal.<sup>7</sup> There must be a real and substantial dispute as to the title to the office to prevent the issuance of this writ.<sup>8</sup> Since the courts decline to try the title to an

<sup>1</sup> State v. Dusman, 39 N. J. L. 677.

Vt. 498; Clarke v. Trenton, 49 N. J. L. 349.

<sup>2</sup> People v. Olds, 3 Cal. 167; State v. Sherwood, 15 Minn. 221.

<sup>3</sup> State v. Dunn, 1 Minor's Ala. R. 46; Com. v. Co. Com'rs, 5 Rawle, 45; Stone v. Small, 54 Vt. 498;

<sup>3</sup> Leeds v. Atlantic City, 52 N. J. L. 332.

Leeds v. Atlantic City, 52 N. J. L. 332.

<sup>4</sup> State v. Miller, 45 N. J. L. 251; State v. McCullough, 3 Nev. 202; Mannix v. State, 115 Ind. 245.

<sup>7</sup> Mannix v. State, 115 Ind. 245.

<sup>5</sup> State v. Hudson Co. (Ch. Frhrs.), 35 N. J. L. 269; Stone v. Small, 54

<sup>6</sup> People v. Stephens, 2 Abb. Pr. (N. S.) 348.

office by this writ, they will not use the writ to compel an officer to discharge the duties of his office when he claims that the law has abolished his office.<sup>1</sup> When a person elected to a membership in a board seeks to compel the other members to recognize him as a member and to admit him to their deliberations, if such board has recognized and accepted another party as a member, a *mandamus* will not issue to compel the acceptance of the relator as a member, since it would involve a trial of the title to the office.<sup>2</sup> A party, applying to be admitted to an office, should do everything necessary to make his title complete, because a *mandamus* will not lie to induct into office on an inchoate title.<sup>3</sup> When a *mandamus* is issued to swear one into office or put him in possession thereof, it confers no right, but confirms his title, if he has one.<sup>4</sup>

§ 144. **Whether mandamus lies to put one into an office pending a contest.**— When on a contest for an office a judgment has been rendered in favor of the relator, a *mandamus* will not lie to put him in possession of the office pending an appeal, if such appeal suspends the judgment;<sup>5</sup> nor will it lie, though the relator has the regular certificate, if the judgment was rendered in favor of the respondent, when the judgment is not suspended by the appeal, since the judgment, while it remains unreversed, gives the respondent the *prima facie* title.<sup>6</sup>

§ 145. **Mandamus to compel an officer elect to assume the duties of the office.**— A party who has been elected to an office owes a duty to the public to qualify himself therefor and to enter upon the discharge of its duties. Such duty being incumbent on him by law, he may be compelled by the writ of *mandamus* to assume the office and to take upon himself the duties thereof.<sup>7</sup> Though he may be sub-

<sup>1</sup> State v. Steen, 43 N. J. L. 542.

<sup>5</sup> Hannon v. Halifax (Com'rs),

<sup>2</sup> Kelly v. Edwards, 69 Cal. 460.

89 N. C. 123.

<sup>3</sup> Thomason v. Justices, 3 Humph. 233.

<sup>6</sup> Allen v. Robinson, 17 Minn. 113.

<sup>7</sup> King v. Leyland, 3 M. & S. 184;

<sup>4</sup> R. v. Clarke, 2 East, 83; Brower v. O'Brien, 2 Ind. 423.

King v. Bower, 1 B. & C. 585.

ject to an indictment or fine for failure so to do,<sup>1</sup> still the writ of *mandamus* will be granted, because neither the indictment nor the fine is an adequate remedy in the premises, since it does not fill the office and prevent a failure of the discharge of public duties. The American courts do not seem as yet to have been called on to enforce this doctrine of the common law.

§ 146. *Mandamus* is allowed in some states to try the title to an office.— The rule that a *mandamus* will not lie to try the title to an office, and that an incumbent of an office under color of right will not be disturbed thereby, has not met with universal acceptance. A few of the courts hold that in such cases a *mandamus* is the proper remedy to determine the title to an office, and that, though a *quo warranto* may remove the incumbent, it will not seat the relator, and that a *mandamus* may still be necessary: so they grant a *mandamus* in the first instance.<sup>2</sup> There seems to be no reason why this view of the law should not be of universal acceptance, unless a different mode of trial is adopted in *mandamus* than in other proceedings, since all the evidence in the case may be adduced in a *mandamus* proceeding. The incumbent should be made a party to the proceedings,<sup>3</sup> or such an order may be made in the case, so that he may protect his rights in the premises. It has been well stated that the rule, that the title to an office will not be tried in a *mandamus* proceeding, should be confined to cases where the person claiming the office adversely to the relator is not made a party to the proceedings.<sup>4</sup>

<sup>1</sup> King v. Bedford, 1 East, 79; Mass. 204; Conlin v. Aldrich, 98 King v. Bower, 1 B. & C. 585. Mass. 557; Strong, Petitioner, 20

<sup>2</sup> Lewis v. Whittle, 77 Va. 415; Pick. 484. The code of North Carolina provides for such a suit. State Jameson v. Hudson, 82 Va. 279; Lindsay v. Luckett, 20 Tex. 516; v. Somers, 96 N. C. 467.

Banton v. Wilson, 4 Tex. 400; Dew <sup>3</sup> Dew v. Sweet Springs (Judges), v. Sweet Springs (Judges), 3 Hen. 3 Hen. & M. 1; *post*, §§ 242, 243.

& M. 1; Harwood v. Marshall, 9 <sup>4</sup> Harwood v. Marshall, 9 Md. 83. Md. 83; Putnam v. Langley, 133

§ 147. When a public officer may be removed from office.—Public officers may be removed from their offices for the causes and in the mode designated by law. The former opinion was, that no corporation had the power of amotion of its officers unless such power was given by charter or prescription.<sup>1</sup> The modern opinion is that such power is incident to every corporation.<sup>2</sup> Such power resides only in the corporation, and not in a part of it, unless so given by charter or prescription.<sup>3</sup> Where his offense is merely against his duty as a corporator, the corporation alone can try him.<sup>4</sup> The offenses for which a corporate officer may be removed are of three classes: 1. Such as relate to his corporate or official character, amounting to breaches of the conditions tacitly or expressly annexed to his office. 2. Such as are infamous, rendering him unfit to enjoy any public office. 3. Such as are of a mixed character, being not only contrary to corporate or official duty, but indictable at common law.<sup>5</sup> The courts will pass upon the legality of the removal of a public officer from his office,<sup>6</sup> and though they will not control the discretion allowed by law to those officers who have removed such officer, yet they will decide wherein discretion is allowed. If a removal is allowed for due cause, the courts will decide what is due cause.<sup>7</sup> When an officer is removed after a proper investigation by a party or tribunal having the legal authority, the courts will not by *mandamus* interfere with such action.<sup>8</sup> Before an officer is removed from office he must have a chance to be heard.<sup>9</sup> The record of the proceedings by which an officer is removed from his office should incor-

<sup>1</sup> R. v. Doncaster (Mayor), 2 L. Raym. 1564.

<sup>2</sup> Rex v. Richardson, 1 Burr. 517; Buller's Nisi Prius, 201; R. v. Doncaster (Mayor), Say. 37; Com. v. Guardians of Poor, 6 S. & R. 469.

<sup>3</sup> R. v. Doncaster (Mayor), Say. 37.

<sup>4</sup> Rex v. Richardson, 1 Burr. 517; Com. v. Guardians of Poor, 6 S. & R. 469.

<sup>5</sup> Com. v. Guardians of Poor, 6 S. & R. 469; State v. Teasdale, 21 Fla. 652.

<sup>6</sup> Q. v. Pomfret (Mayor), 10 Mod. 107.

<sup>7</sup> State v. Watertown (Com. Council), 9 Wis. 254.

<sup>8</sup> State v. Cleveland (Fire Com'rs), 26 Ohio St. 24.

<sup>9</sup> Geter v. Com'rs, 1 Bay, 354.

porate the charges made against him and the substance of the evidence adduced on his trial.<sup>1</sup> Where the law requires the cause for the removal of the county commissioners of the clerk of their court to be stated on their record, a failure to make such entry on the record will warrant a writ of *mandamus* to restore such removed officer.<sup>2</sup>

§ 148. **Mandamus lies to restore an officer wrongfully removed from office.**— When an officer has been wrongfully removed from his office, he will be restored thereto by the writ of *mandamus*.<sup>3</sup> The same rule applies in case of a wrongful suspension from office,<sup>4</sup> since such suspension is a temporary removal, and otherwise, under the pretense of repeated removals, an officer might be entirely excluded from the advantages of his situation.<sup>5</sup> So when a board wrongfully removes a member thereof, and declines to recognize him any longer as a part thereof, a *mandamus* will issue to compel the other members to accept the relator as a member, and to allow him to participate in their deliberations and actions.<sup>6</sup> Where, however, the incumbent of an office was removed, and another appointed to his office by a board having the power to fill vacancies in such offices,<sup>7</sup> and where a third party was appointed to occupy the office by a board having the power of appointment upon the ter-

<sup>1</sup> *Geter v. Com'rs*, 1 Bay, 354; *Singleton v. Com'rs*, 2 Bay, 105.

<sup>2</sup> *Street v. Gallatin Co. (Com'rs)*, Breese, 25.

<sup>3</sup> *Ex parte Lusk*, 82 Ala. 519; *Metsker v. Neally*, 41 Kan. 122; *Ex parte Wiley*, 54 Ala. 226; *Banton v. Wilson*, 4 Tex. 400; *Johnson v. Mann*, 77 Va. 265; *King v. Doncaster (Mayor)*, 2 L. Raym. 1564; *State v. Teasdale*, 21 Fla. 652; *King v. Canterbury (City)*, 1 Lev. 119; *Madison (City) v. Korbly*, 32 Ind. 74; *Rex v. Liverpool (Town)*, Burr. 723; *Nelson v. Edwards*, 55 Tex. 389; *Doyle v. Raleigh*, 89 N. C. 133; *Geter v. Commissioners*, 1 Bay, 354;

*Singleton v. Commissioners*, 2 Bay, 105; *Felts v. Memphis (City)*, 2 Head, 650; *Dew v. Sweet Springs (Judges)*, 3 Hen. & M. 1; *Burr v. Norton*, 25 Conn. 103; *Milliken v. City Council*, 54 Tex. 388; *State v. Watertown (Common Council)*, 9 Wis. 254; *R. v. Oxford (Mayor)*, 2 Salk. 428.

<sup>4</sup> *Ex parte Lusk*, 82 Ala. 519; *Metsker v. Neally*, 41 Kan. 122; *Ex parte Diggs*, 52 Ala. 381; *Ex parte Wiley*, 54 Ala. 226.

<sup>5</sup> *Rex v. London*, 2 T. R. 177.

<sup>6</sup> *Gaal v. Townsend*, 77 Tex. 464.

<sup>7</sup> *Ellison v. Raleigh*, 89 N. C. 125.

mination of the term of the incumbent,<sup>1</sup> the writ of *mandamus* to restore the excluded officer was refused, because *quo warranto* was considered to be an appropriate remedy. This ruling is contrary to the decisions cited, where the same question was directly passed on, or the same state of facts seems to have existed according to the inferences to be drawn from the opinions.<sup>2</sup>

§ 149. **Mandamus will not lie to seat an officer who may be removed at once.**—The courts in the exercise of their discretion will not issue this writ unless substantial results will be accomplished thereby, and will not issue it to restore a person to an office held at the pleasure of the respondents, since they can at once remove such restored officer;<sup>3</sup> nor where the officer was irregularly removed, but there exist good grounds for a regular removal as soon as he is restored;<sup>4</sup> nor where he could not show a legal and constitutional right to exercise the office, as when he had taken another and incompatible office.<sup>5</sup>

§ 150. **Mandamus when officer not removed but another party intrudes himself.**—When there was no real removal, but another party under color of right intruded himself and interfered with the discharge of its duties, a *mandamus* was refused to restore the earlier incumbent to his office, but was granted to restrain the intruder from interfering with the discharge of the duties of the office.<sup>6</sup> In a

<sup>1</sup> St. Louis County Court v. Sparks, 10 Mo. 117.

<sup>2</sup> Ex parte Wiley, 54 Ala. 226; State v. Teasdale, 21 Fla. 652; Madison (City) v. Korbly, 32 Ind. 74; Geter v. Commissioners, 1 Bay, 354; Singleton v. Commissioners, 2 Bay, 105; Ex parte Diggs, 52 Ala. 381; State v. Watertown (Common Council), 9 Wis. 254.

<sup>3</sup> Rex v. Coventry (Mayor), 2 Salk. 430. An officer was restored because the corporation had not declared its will to remove him, the court holding that such will must

be declared before the court would notice it. Rex v. Oxford (Mayor),

2 Salk. 428.

<sup>4</sup> King v. London (Mayor), 2 Term R. 177; King v. Bristol, 1 D. & R. 389; Rex v. Axbridge (Mayor), Cowp. 523; R. v. Griffiths, 5 B. & Ald. 731; Wiley, Ex parte, 54 Ala. 226; State v. Board of Health, 49 N. J. L. 349.

<sup>5</sup> Spencer Co. (Just.) v. Harcourt, 4 B. Mon. 499.

<sup>6</sup> People v. Scrugham, 20 Barb. 302.



similar case it was held that the office was not full *de facto* against the relator, unless by his conduct he elected to consider himself ousted. In contemplation of law his title to the office *de jure* draws to it possession *de jure*, as in cases where simultaneous acts of occupancy are exercised by contestants over a legal title. In such cases there is nothing to be tried by *quo warranto*, and a *mandamus* is the proper remedy.<sup>1</sup>

§ 151. **Mandamus when removal from office is discretionary.**— Since this writ never interferes with duties which are discretionary, it will not lie to compel the removal of an officer from office when such removal is discretionary.<sup>2</sup>

§ 152. **Party having the prima facie title to an office can enforce his rights as such officer by the writ of mandamus.**— In many cases the writ of *mandamus* has been applied for to compel the performance of duties, wherein it was necessary to take into consideration the title to office, though such title was then in dispute, and there were two parties each of whom claimed the office, as to give a certificate of election, to approve an officer's bond, to issue a warrant for an officer's salary, or to order the delivery of the books and papers belonging to an office. In such cases the courts recognize and enforce the claims of the party who has the *prima facie* title to the office.<sup>3</sup> The writ has been issued: to audit the salary of a member of the legislature who had a certificate of election from the proper returning board;<sup>4</sup> to audit the salary of a judge who had the prior commission and was the *de facto* judge;<sup>5</sup> to pass on the bond of a sheriff who had the commission, though the county court claimed there was no election of a sheriff;<sup>6</sup> to pass on the bond as collector of the county of one declared by the county canvassers to have been elected, though

<sup>1</sup> Leeds v. Atlantic City, 52 N. J. L. 332.

<sup>2</sup> King v. West Looe (Mayor), 5 D. & R. 414.

<sup>3</sup> State v. John, 81 Mo. 13.

<sup>4</sup> State v. Kenney, 9 Mont. 389.

<sup>5</sup> State v. Draper, 48 Mo. 213.

<sup>6</sup> State v. Howard Co. Court, 41 Mo. 247.

the board of chosen freeholders asserted he was not elected;<sup>1</sup> to approve the bond of the clerk of the court, who had been commissioned by the governor;<sup>2</sup> to draw a warrant for his salary as judge in favor of one who had been commissioned by the governor;<sup>3</sup> to deliver the books of an office to one who was duly elected, and had the certificate of his election, and had qualified;<sup>4</sup> to deliver the books belonging to an office to one who had the certificate of his election thereto;<sup>5</sup> and to deliver the office-room and furniture thereof to one who had been appointed to the office upon the removal of the incumbent, though the incumbent had appealed from such order, when such appeal was not a *supersedeas*.<sup>6</sup> A superintendent of schools who had his certificate of election, had filed his official bond and was filling the office, asked for a *mandamus* to compel the county commissioners to approve another bond, which he was required to give. The commissioners returned that he was elected to his office by a corrupt agreement, and that his election was void. The court adjudged the return to be bad, because the certificate of election barred all inquiry as to his right to hold the office except in a direct proceeding to contest his right.<sup>7</sup> A clerk of a county was considered to be subject to proceedings for contempt in not obeying a peremptory writ of *mandamus* to recognize the relators as the county commissioners, for the court must have decided in the *mandamus* proceeding that they were the *de facto* officers, and the writ merely ordered him to do his duty and not to attempt to exercise judicial functions.<sup>8</sup> The charter of a village required every person elected to an office therein to take, and file with the village clerk, an oath of office. A village ordinance authorized the clerk

<sup>1</sup> State v. Camden Co. (Chosen Freeholders), 35 N. J. L. 217.

<sup>2</sup> Beck v. Jackson, 43 Mo. 117; State v. Wear, 37 Mo. Ap. 325.

<sup>3</sup> State v. Clark, 52 Mo. 508.

<sup>4</sup> State v. Sherwood, 15 Minn. 221; State v. Saxon, 25 Fla. 792.

<sup>5</sup> State v. Jaynes, 19 Neb. 161;

State v. Dodson, 21 Neb. 218; Driscoll v. Jones (S. Dak., Mar. 1, 1890), 44 N. W. Rep. 726.

<sup>6</sup> State v. Meeker, 19 Neb. 444.

<sup>7</sup> State v. Warrick Co. (Com'rs), 124 Ind. 554.

<sup>8</sup> Delgado, In re, 140 U. S. 586.

to administer the oath. The return of the inspectors of the election showed that O'Brien received sixty-six votes, Morris A. Young sixty-six votes, Morris Young one vote and M. A. Young one vote. The court decided that the return showed presumptively Young's election, and that he was entitled to be sworn in that he might assert his legal rights; that the clerk was bound to administer the oath to the party having the *prima facie* title, though he might himself think the election was not legal. The court suggested that perhaps the clerk might refuse if each person was known to be ineligible to the office. The writ was granted in Young's favor.<sup>1</sup>

§ 153. Subject continued.— The writ has been refused, because another had been commissioned, and therefore had the *prima facie* title: to approve the bond of the relator as sheriff;<sup>2</sup> to audit a judge's salary;<sup>3</sup> and to audit the salary of the commissioner of the permanent seat of government.<sup>4</sup> When under the circumstances of the case the alternative *mandamus* will involve the title to an office, those courts which refuse to try a title to an office by the writ of *mandamus* will refuse to issue the writ. For this reason the writ has been refused: to compel a county treasurer to deliver the books of his office to one who had been appointed his successor, on the allegation that his office was vacated by virtue of his election as a member of the legislature and by his entry upon the duties thereof;<sup>5</sup> and to compel a notary to deliver up the books of his office, which, it was claimed, was vacated by the failure of the legislature to pass certain laws.<sup>6</sup> For the same reason such courts have refused to allow the respondent to raise the issue of the eligibility of the relator to the office concerning which, as incumbent thereof, he is seeking to enforce his rights.<sup>7</sup>

<sup>1</sup> People v. Straight, 128 N. Y. 545.

<sup>2</sup> Boone Co. (Com'rs) v. State, 61 Ind. 379.

<sup>3</sup> State v. Moseley, 34 Mo. 375; State v. Thompson, 36 Mo. 70.

<sup>4</sup> Winston v. Moseley, 35 Mo. 146.

<sup>5</sup> State v. Williams, 25 Minn. 340.

<sup>6</sup> State v. Pitot, 21 La. An. 336.

<sup>7</sup> Turner v. Melony, 13 Cal. 621;

State v. Sherwood, 15 Minn. 221; State v. Gamble, 13 Fla. 9. *Con-*

The fact that the respondent has paid the salary of an office to another, who was not the *de facto* officer, is no reason why he should not be compelled by a *mandamus* to issue a warrant for his salary in favor of the *de jure* officer;<sup>1</sup> but the rule is different when such payment is made to a *de facto* officer, provided, and not otherwise, he came into office under color of title.<sup>2</sup> When, however, the comptroller believes that the party is not an officer *de jure*, he may, as a good officer, refuse to draw a warrant for his salary, and in deciding a *mandamus* for such salary the court may determine the legality of his title, if there is no third party not before the court whose rights are involved in such determination.<sup>3</sup> So when an officer has established his title to an office from a certain date by *quo warranto*, he is entitled to his salary from that date, although he did not acquire possession thereof till a later date.<sup>4</sup> A certificate of election was refused to a party who was contesting the election of another, to whom the certificate was given, on the ground that he had by such proceeding an adequate remedy.<sup>5</sup> When the approval of the bond of an officer-elect is considered to be an act involving discretion, the writ will be refused; but when it is not so considered, the writ will be granted to compel such approval in favor of every officer elect.<sup>6</sup>

**§ 154. Mandamus for books and paraphernalia of office by party with the prima facie title.**—As indicated in a prior section,<sup>7</sup> the officer entitled to the possession of the books, papers, records and insignia of office, and to the rooms and buildings properly under his control, may obtain such possession by the writ of *mandamus*, when they are improperly retained from him.<sup>8</sup> One who has been ap-

*tra*: State v. Williams, 99 Mo. 291; State v. Newman, 91 Mo. 445; State v. Somers, 96 N. C. 467.

<sup>1</sup> Williams v. Clayton (Utah, Mar. 8, 1889), 21 Pac. Rep. 398.

<sup>2</sup> People v. Brennan, 45 Barb. 457.

<sup>3</sup> State v. Gamble, 13 Fla. 9.

<sup>4</sup> Turner v. Melony, 13 Cal. 621.

<sup>5</sup> State v. Cover, 50 Ill. 100.

<sup>6</sup> See § 118.

<sup>7</sup> § 152.

<sup>8</sup> Nelson v. Edwards, 55 Tex. 389; Walter v. Belding, 24 Vt. 658; Banton v. Wilson, 4 Tex. 400; State v.

pointed or elected to an office may by this writ obtain all the muniments of his office from his predecessor.<sup>1</sup> An action of replevin is not considered to be a sufficient remedy, since, in case the books are not found, the judgment can only be for their value, while it might be impossible to show their value.<sup>2</sup> It might be added, that it might be impossible to adequately protect the public interests, unless the books were produced. Though there may be a dispute as to the title to the office, even those courts which refuse to try the title to an office by the writ of *mandamus* will issue the writ in such cases in favor of the party who shows the *prima facie* title.<sup>3</sup> Such action will in no way prejudice or affect the contest for the office.<sup>4</sup> The party who has received the certificate of election or the commission of office, and has qualified, is generally considered to have the *prima facie* title.<sup>5</sup> The relator in such case must show that he is an officer *de jure*.<sup>6</sup> Though the court may refuse to try the title to an office by the writ of *mandamus*, yet it will not regard a groundless assumption of the respondent's election to an office, and a pretended exercise of the office *de facto*, but will compel the delivery of the seals, books, papers and instruments of the office to the party properly elected.<sup>7</sup>

§ 155. Subject continued.—In one case where a return of official books was sought, the court stated that when a

Johnson, 29 La. An. 399; Keokuk (City) v. Merriam, 44 Iowa, 432; Territory v. Shearer, 2 Dak. 332.

<sup>1</sup> Stone v. Small, 59 Vt. 498; Cunningham v. O'Connor, 80 Tenn. 397; McGee v. State, 103 Ind. 444; Huffman v. Mills, 39 Kans. 577; Frisbie v. Fogg, 78 Ind. 269; Warner v. Myers, 44 Oreg. 72; Keokuk v. Merriam, 44 Iowa, 432; People v. Hilliard, 29 Ill. 413; State v. Kirman, 17 Nev. 380.

<sup>2</sup> Keokuk (City) v. Merriam, 44 Iowa, 432. *Contra*: Anon., 2 Chitty, 255.

<sup>3</sup> State v. Dusman, 39 N. J. L. 677.

<sup>4</sup> People v. Head, 25 Ill. 325; State v. Saxon, 25 Fla. 792.

<sup>5</sup> People v. Head, 25 Ill. 325; Crowell v. Lambert, 10 Minn. 369; Warner v. Myers, 4 Oreg. 72; State v. Sherwood, 15 Minn. 221; State v. Saxon, 25 Fla. 792; State v. Jaynes, 19 Neb. 161; Huffman v. Mills, 39 Kans. 577; State v. Dodson, 21 Neb. 218; Driscoll v. Jones (S. Dak., Mar. 1, 1890), 44 N. W. Rep. 726.

<sup>6</sup> People v. Nostrand, 46 N. Y. 375.

<sup>7</sup> People v. Kilduff, 15 Ill. 492; Kimball v. Lamprey, 19 N. H. 215.

person who is in office *de jure* and *de facto* is interfered with by one whose lack of title is plain, and is governed by adjudicated cases in our own courts, it is not only proper, but best, to settle the title to the office by the writ of *mandamus*, but ordinarily it is not so.<sup>1</sup> This writ has also been issued to compel: the delivery of the mace and other signs of mayoralty, and the books and property of the corporation, to the succeeding mayor;<sup>2</sup> the delivery of public buildings to the board of public buildings by the officer whom they had removed from the charge thereof;<sup>3</sup> the delivery of a rate book to the overseers of the poor;<sup>4</sup> the delivery of the books of accounts of the surveyor of highways to the church wardens;<sup>5</sup> the delivery of the regalia of a corporation;<sup>6</sup> and the delivery of the jail to the sheriff, of which by law he is entitled to the custody.<sup>7</sup> The writ has also been issued: to compel the steward, who kept the books, to produce them at the corporate meetings to enter therein the election of their members;<sup>8</sup> to compel a municipal officer to submit his books of account to the officers authorized to inspect them;<sup>9</sup> to compel the registers of voters to deposit their original books with the clerks of the proper counties;<sup>10</sup> and to compel building commissioners, upon the cessation of their duties, to deposit their building plans and specifications with the proper custodians thereof.<sup>11</sup> By this writ a party may obtain an inspection of public books and papers,<sup>12</sup> but he must show grounds of a special or public nature before the writ will be granted;<sup>13</sup> but an inspection

<sup>1</sup> Lawrence v. Hanley, 84 Mich. 399.

<sup>2</sup> Rex v. Owen, 5 Mod. 314; People v. Kilduff, 15 Ill. 492.

<sup>3</sup> State v. Bacon, 6 Neb. 286. *Contra* as to a room, because there was another remedy. Washoe Co. (Com'rs) v. Hatch, 9 Nev. 357.

<sup>4</sup> R. v. Christchurch, 7 E. & B. 409; R. v. Clapham, 1 Wils. 305.

<sup>5</sup> King v. Round, 4 A. & E. 139.

<sup>6</sup> 3 Black. Com. 110.

<sup>7</sup> Felts v. Memphis (Mayor), 2 Head, 650; Burr v. Norton, 25 Conn. 103; Warner v. Myers, 4 Oreg. 72.

<sup>8</sup> Calne (Borough), Case of, 2 Stra. 948.

<sup>9</sup> Keokuk (City) v. Merriam, 44 Iowa, 432.

<sup>10</sup> McDiarmid v. Fitch, 27 Ark. 106.

<sup>11</sup> State v. Kirkley, 29 Md. 85.

<sup>12</sup> 3 Black. Com. 110.

<sup>13</sup> Briggs, *Ex parte*, 1 E. & E. 881; *ante*, § 14.

of the records of an executive department will not be granted, when such inspection may be detrimental to public interests.<sup>1</sup> A rated parishioner has a right to inspect the accounts of expenditure of parish money kept by the guardians of the poor.<sup>2</sup> Any one can trade in any place, unless such right is taken away by custom or by-law, and when he is charged with having violated a city ordinance by so doing, he has a right, though not a corporator, to inspect the corporation books to ascertain what the law is which it is charged he has violated.<sup>3</sup> A county clerk who had delivered the assessment books to one appointed by the county authorities, who had qualified, is not liable to a writ of *mandamus* to compel him to deliver the books to one who claims to have been elected assessor. Such clerk having delivered the books to the *de facto* officer, no more can be required of him.<sup>4</sup> The books which contain the public accounts of an officer become thereby public books, and a *mandamus* will lie to compel an inspection of them, or their delivery to the party entitled to their custody, though such officer may have made entries therein relative to other matters.<sup>5</sup>

§ 156. **Mandamus not lie to private individual to surrender official books.**— Since the writ of *mandamus* does not run to compel the performance of any duty by a private party, it will not lie to compel the surrender of official books by one who is not shown to be other than a private individual.<sup>6</sup> A judge, upon the termination of his term of office, surrendered the books thereof to his successor, but a few days afterwards he took them away surreptitiously. A *mandamus* to compel him to deliver up those books was refused, because it was not alleged that he was acting as an officer.<sup>7</sup> Where a private party had made a book of the

<sup>1</sup> Brewer v. Watson, 61 Ala. 310.

<sup>5</sup> King v. Payn, 1 Nev. & P. 524.

<sup>2</sup> Rex v. Great Faringdon (Guardians), 9 Barn. & C. 541.

<sup>6</sup> Q. v. Hopkins, 1 Ad. & E. (N. S.) 16.

<sup>3</sup> Harrison v. Williams, 4 D. & R. 820.

<sup>7</sup> Hussey v. Hamilton, 5 Kans. 462.

<sup>4</sup> People v. Lieb, 85 Ill. 484.

surveys and plats of county roads under a contract with the county court, and had been paid therefor, and had subsequently regained the possession of the book, the court would not issue a writ of *mandamus* to compel him to surrender the possession thereof.<sup>1</sup> In such cases it is asserted that the writ lies only against an ex-officer, whether of a public or a private corporation, company, church or society, or the executor or widow of such officer.<sup>2</sup> The decisions sustain the above propositions, though we think they ignore the necessities of the public service. We have found but one case which allowed the writ to issue in such a case to a private party. A writ was applied for to compel the respondent to surrender the books of a borough. He replied that he held them as executor of A., who had held them as security for money he had loaned the borough. There was no allegation that A. had ever been an officer. The court said that, since the respondent had admitted that he had public books in his possession, a writ of *mandamus* was proper to compel him to surrender them.<sup>3</sup>

<sup>1</sup> State v. Trent, 58 Mo. 571.

<sup>3</sup> King v. Ingram, 1 W. Black, 50.

<sup>2</sup> State v. Trent, 58 Mo. 571.



## CHAPTER 12.

### MANDAMUS TO PRIVATE CORPORATIONS.

- § 157. *Mandamus* runs to private corporations because they are the creation of the state.
158. What duties of a private corporation are enforceable by *mandamus*.
159. Illustrations of the issue of the writ of *mandamus* to private corporations.
160. *Mandamus* to compel the transfer of its stock by a private corporation.
161. *Mandamus* to obtain the inspection of the books of a private corporation.
162. *Mandamus* lies to common carriers to prevent discrimination.
163. *Mandamus* will not lie to a private corporation when there is another remedy.
164. *Mandamus* will not go against a private corporation when it is financially unable to do the act desired.
165. *Mandamus* to compel officers of private corporation to discharge their duties.
166. *Mandamus* to restore to membership in a private corporation.
167. Will a *mandamus* lie to restore to membership in a private corporation when no pecuniary interests are involved?
168. What irregularities in expelling a member of a private corporation will vitiate such expulsion when it is reviewed by *mandamus*.
169. Expelled members must appeal to appellate tribunals before they can call for a *mandamus*.
170. *Mandamus* to restore a member will not issue when he may be regularly expelled upon his restoration.
171. An action for damages for expulsion from a corporation is a waiver of all right to apply for a restoration by *mandamus*.
172. *Mandamus* to admit to membership in private corporations.
173. *Mandamus* to restore or to admit an officer of a private corporation.
174. *Mandamus* to benevolent associations to pay death losses.
175. If a private corporation has a visitor, a *mandamus* lies only when he fails to act.
176. *Mandamus* issues in ecclesiastical matters only when property rights are involved.
177. *Mandamus* to a foreign corporation.

**§ 157. Mandamus runs to private corporations because they are the creation of the state.**—The writ of *mandamus* lies to private corporations. This may be considered to be an exception to the general rule, that this writ only runs to public officers. However, such jurisdiction is well established, and the reason given is that such corporations are the creation of the government, and that a supervisory or visitorial power is always impliedly reserved to see that corporations act agreeably to the end of their institution,<sup>1</sup> that they keep within the limits of their lawful powers, and to correct and punish abuses of their franchises.<sup>2</sup> Such visitorial power is exercised by the state through its common-law courts.<sup>3</sup> It is the acceptance of the charter which subjects the corporation to the supervision of the proper legal authorities;<sup>4</sup> consequently the court will not attempt, by the writ of *mandamus*, to regulate the affairs of unincorporated societies or associations.<sup>5</sup>

**§ 158. What duties of a private corporation are enforceable by a mandamus.**—The aid of a writ of *mandamus* can be invoked to compel a private corporation to exercise its franchises,<sup>6</sup> and to carry out fairly and fully the objects for which it was created.<sup>7</sup> The performance of any duty incumbent on a private corporation may be enforced by this writ, but this duty must be specific and plainly im-

<sup>1</sup> *R. v. Askew*, 4 Burr. 2186; *Medi-cal, etc. Soc. v. Weatherby*, 75 Ala. 248.

<sup>2</sup> *State v. Milwaukee Chamber of Commerce*, 47 Wis. 670.

<sup>3</sup> *State v. Georgia Med. Soc.*, 38 Ga. 608; *State v. Milwaukee Chamber of Commerce*, 47 Wis. 670; *Burt v. Michigan G. Lodge*, 66 Mich. 85; *Black, etc. Soc. v. Vandyke*, 2 Whart. 309.

<sup>4</sup> *State v. Georgia, etc. Med. Soc.*, 38 Ga. 608.

<sup>5</sup> *Burt v. Michigan G. Lodge*, 66 Mich. 85; *Austin v. Searing*, 16 N. Y. 112; *Fritz v. Muck*, 62 How.

Pr. 69; *People v. German, etc. Church*, 53 N. Y. 103. *Contra: Otto v. Journeymen, etc. Union*, 75 Cal. 308. This decision is sustained by California law, which allows a *mandamus* to be brought to compel the admission of a party to the use and enjoyment of a right to which he is entitled. 3 Deering's Cal. Code (1885), § 1085.

<sup>6</sup> *People v. N. Y. etc. R. R.*, 22 Hun. 533.

<sup>7</sup> *R. R. Com'rs v. Portland, etc. R. R.*, 63 Me. 269; *State v. Hartford, etc. R. R.*, 29 Conn. 538.

posed.<sup>1</sup> It may be imposed by its charter,<sup>2</sup> by the general statutes,<sup>3</sup> or by the common law,<sup>4</sup> either in terms or by fair and reasonable construction and implication,<sup>5</sup> or must necessarily arise from the nature of the privileges or obligations which the charter creates.<sup>6</sup> The English courts in their discretion formerly refused to grant the writ of *mandamus* against private corporations, unless the matters involved were important on public grounds, and some of the American decisions are to the same effect;<sup>7</sup> but a perusal of these pages will show that, under the visitatorial power of the state, any breach of duty by a private corporation may be corrected by this writ under the general principles already mentioned governing its issuance.

**§ 159. Illustrations of the issue of the writ of mandamus to private corporations.**—The writ of *mandamus* has been issued to private corporations in a great variety of causes to compel the performance of various duties devolving upon them. It has been issued to compel them: to pay the tax assessed on their capital stock;<sup>8</sup> to complete their railroad line;<sup>9</sup> to operate all of their railroad line, and to restore a part which had been taken up;<sup>10</sup> to construct a

<sup>1</sup> *People v. New York, etc. R. R.*, 104 N. Y. 58.

<sup>2</sup> *State v. Einstein*, 46 N. J. L. 479; *State v. Patterson, etc. R. R.*, 43 N. J. L. 505.

<sup>3</sup> *State v. Ousatonic W. Co.*, 51 Conn. 137; *Bailey v. Oviatt*, 46 Vt. 627.

<sup>4</sup> *State v. Republican, etc. R. R.*, 17 Neb. 647; *Trenton, etc. Co.*, In re, 20 N. J. L. 659; *People v. Chicago, etc. R. R.*, 67 Ill. 118; *Cummins v. Evansville, etc. R. R.*, 115 Ind. 417.

<sup>5</sup> *State v. Ousatonic W. Co.*, 51 Conn. 137.

<sup>6</sup> *State v. Einstein*, 46 N. J. L. 479. In Kentucky, under their special statute, it is held that the writ of *mandamus* cannot issue to a private corporation, unless it is charged

with the exercise of a governmental function, or has a right to exercise a power of a public nature. *Cook v. College Phy. & S.*, 9 Bush. 541; *Schmidt v. Abraham Lincoln Lodge*, 84 Ky. 490.

<sup>7</sup> *Lamphere v. Grand Lodge*, 47 Mich. 429; *Harguell v. Lafayette B. Soc.*, 47 Mich. 648.

<sup>8</sup> *Einory v. State*, 41 Md. 38; *Barney v. State*, 42 Md. 480.

<sup>9</sup> *Q. v. Eastern C. R. R.*, 10 Ad. & E. 531. The writ for this purpose has been refused, because the incorporation act did not make it obligatory to build the road. *York, etc. R. R. v. Q.*, 1 El. & Bl. 853; *Great Western R. R. v. Q.*, 1 El. & Bl. 874.

<sup>10</sup> *People v. Albany, etc. R. R.*, 24 N. Y. 261; *King v. Severn, etc.*

bridge over its railroad track;<sup>1</sup> to construct a bridge over its canal;<sup>2</sup> to construct a bridge over a river;<sup>3</sup> to furnish a cattle-guard for its railroad track; to restore a highway to its former condition;<sup>4</sup> to put a public road in repair,<sup>5</sup> and to make necessary and convenient crossings over streets occupied by their railroad tracks and to keep them in repair;<sup>7</sup> to build their railroad track across a stream so as not to obstruct it;<sup>8</sup> to submit their affairs to an examination;<sup>9</sup> to furnish the tax court with the names and residences of their stockholders;<sup>10</sup> to allow a lot-owner to bury a colored person in his lot;<sup>11</sup> to build a railroad depot where the commissioners thought public necessities required it;<sup>12</sup> to resume the use of an abandoned railroad station;<sup>13</sup> to receive a tax receipt in payment of railroad fare;<sup>14</sup> and to

R. R., 2 B. & Ald. 646; State v. Hartford, etc. R. R., 29 Conn. 538; People v. Rome, etc. R. R., 103 N. Y. 95.

<sup>1</sup> People v. Chicago, etc. R. R., 67 Ill. 118; Boggs v. C., B. & Q. R. R., 54 Iowa, 435; State v. Missouri P. R. R., 33 Kan. 176.

<sup>2</sup> State v. Savannah, etc. Co., 26 Ga. 665; Trenton, etc. Co., In re, 20 N. J. L. 659.

<sup>3</sup> State v. Wilmington B. Co., 3 Harring. 312.

<sup>4</sup> Boggs v. C., B. & Q. R. R., 54 Iowa, 435.

<sup>5</sup> Cummins v. Evansville, etc. R. R., 115 Ind. 417; State v. Hannibal, etc. R. R., 86 Mo. 13; People v. Dutchess, etc. R. R., 58 N. Y. 152. When a railroad company has a discretion as to the manner of restoring a highway, across or along which its railroad has been constructed, such discretion is a ministerial one. The act of restoration must be done, and as to that there is no discretion. If it elects a mode of restoration, and such mode fails,

and yet the company claims to have discharged its duty, the court in a *mandamus* proceeding to compel the performance of such duty should point out in the writ wherein it has failed, and direct particularly what must be done, so that there may not be another failure. People v. Dutchess, etc. R. R., 58 N. Y. 152.

<sup>6</sup> Pittsburgh, etc. R. R. v. Com., 104 Pa. St. 583.

<sup>7</sup> Indianapolis, etc. R. R. v. State, 37 Ind. 489.

<sup>8</sup> State v. N. E. R. R., 9 Rich. 247.

<sup>9</sup> People v. State Ins. Co., 19 Mich. 392.

<sup>10</sup> Firemen's Ins. Co. v. Baltimore (Mayor), 23 Md. 296.

<sup>11</sup> Mount Moriah C. Asso. v. Com., 81 Pa. St. 235.

<sup>12</sup> Railroad Com'rs v. Portland, etc. R. R., 63 Me. 269.

<sup>13</sup> State v. New Haven, etc. R. R., 41 Conn. 134.

<sup>14</sup> Mobile, etc. R. R. v. Wisdom, 5 Heisk. 125.

stop their railroad trains at a certain place as required by law.<sup>1</sup>

§ 160. **Mandamus to compel the transfer of its stock by a private corporation.**—The writ of *mandamus* has often been invoked to compel the transfer of the stock of private corporations. As a general rule the writ has been denied in such cases. Sometimes it has been denied, because third parties, not before the court, claimed to be the owners, but the reason generally assigned was, that it was not a favorite chattel, so there was no *proemium affectionis* involved in the case, but any other stock of the same company would do, which could be purchased in the market; consequently a suit for damages was an adequate remedy.<sup>2</sup> The writ has, however, been allowed in several cases by reason of certain statutory provisions. Where stock was sold on execution the law required the proper officer of the corporation to make the transfer, and the transfer was compelled, because such officer became *pro hac vice* a public officer;<sup>3</sup> but a *mandamus* would not be granted in case of a private sale.<sup>4</sup> So a *mandamus* was granted to a corporation to allow a sheriff to transfer on the books of the corporation stock sold by him, in accordance with the provisions of law;

<sup>1</sup> New Haven, etc. R. R. v. State, 44 Conn. 376.

<sup>2</sup> Murray v. Stevens, 110 Mass. 95; State v. Guerrero, 12 Nev. 105; Birmingham F. I. Co. v. Com., 92 Pa. St. 72; People v. Parker Vein Coal Co., 10 How. Pr. 543; Shipley v. Mechanics' Bank, 10 John. 484; Durham v. Monumental, etc. Co., 9 Oreg. 41; Baker v. Marshall, 15 Minn. 180; Townes v. Nichols, 73 Me. 515; Stackpole v. Seymour, 127 Mass. 104; State v. Warren, etc. Co., 32 N. J. L. 439; Kimball v. Union Water Co., 44 Cal. 173; Firemen's I. Co., Ex parte, 6 Hill, 243; State v. Rombauer, 46 Mo. 155; Tobey v. Hakes, 54 Conn. 274;

State v. People's, etc. Assoc., 43 N. J. L. 389; Freon v. Carriage Co., 42 Ohio St. 30. *Contra*, State v. New Orleans R. R., 38 La. An. 312. The writ was allowed where there was no dispute as to the ownership. State v. New Orleans, etc. Co., 25 La. An. 413. It was also said to be allowable, where there was a clear legal right and no other remedy, but was denied in that case, because the relator had only an equitable title, being an assignee merely by delivery. Burnsville I. Co. v. State, 119 Ind. 382.

<sup>3</sup> Bailey v. Strohecker, 38 Ga. 259.

<sup>4</sup> Bank of State v. Harrison, 66 Ga. 696.

but the court stated that the general rule was otherwise.<sup>1</sup> The writ was granted in a case, where the court placed stress on the lack of any other sufficient remedy under the circumstances of that case and the fact that it was a *quasi*-public corporation (a railroad), and seemed to imply that it might not be granted in the case of a purely private corporation.<sup>2</sup> In granting a *mandamus* to compel a transfer of stock as provided by statute, the court maintained that damages were not an adequate remedy, because the relator did not thereby obtain specific relief, which included a right to be a stockholder and to participate in the exercise of its franchises.<sup>3</sup> A suit for damages does not always seem to be adequate, since with the damages obtained the relator may not be able to buy the stock desired, or it may be important to have the stock in order to be eligible to office,<sup>4</sup> or to obtain control of the organization of the corporation in order to prevent unskilful management of its affairs. As to the latter trouble a relator is not without relief, where courts of equity have jurisdiction to compel a corporation to recognize, as a member thereof, one who has the equitable title to any of its stock. In such a case a court of common law could reasonably, in the exercise of its discretion, refuse to grant a *mandamus*. The English courts at first refused to grant a *mandamus* to compel a private corporation to enter on its books the transfer of any of its stock, claiming that such matters were private, and that this writ was confined to matters of public and general importance.<sup>5</sup> This position they have long since abandoned, and have often issued this writ to compel such transfer.<sup>6</sup> They now refuse the use of the prerogative writ for that

<sup>1</sup> State v. First Nat. Bank, 89 Ind. 302.

<sup>2</sup> Townshend v. McIver, 2 Rich. (N. S.) 25.

<sup>3</sup> Memphis, etc. Co. v. Pike, 9 Heisk. 697.

<sup>4</sup> Freon v. Carriage Co., 42 Ohio St. 30.

<sup>5</sup> King v. London Assur. Co., 1 D. & R. 510.

<sup>6</sup> Reg. v. Midland, etc. R. R., 9 L. T. R. (N. S.) 151; King v. Worcester, etc. Co., 1 Man. & Ry. 529; Norris v. Irish L. Co., 8 El. & Bl.

512.

purpose, since the same end may be attained by the new writ of *mandamus* lately authorized.<sup>1</sup>

**§ 161. Mandamus to obtain an inspection of the books of a private corporation.**— A stockholder of a private corporation may by the writ of *mandamus*, if such privilege is denied him, obtain an inspection of the corporate books. He must, however, show that he desires such inspection for some just or useful object, or some injury which he will sustain if he is not allowed to inspect them.<sup>2</sup> He will then be allowed to inspect them at the proper place and on proper occasions,<sup>3</sup> but only to the extent necessary for the purpose indicated.<sup>4</sup> It has been granted to enable him to obtain the facts correctly to enable him to sue the corporation and its directors for abuse of their positions.<sup>5</sup> The writ will not be granted when it is asked for mere curiosity,<sup>6</sup> or for speculative purposes,<sup>7</sup> or personal ends,<sup>8</sup> or upon merely alleging grounds on which the relator believes that the corporate affairs have been improperly conducted and the officers unduly chosen, and complaining of misgovernment in some particular instances not affecting the parties themselves or any matter then in dispute,<sup>9</sup> or if there is fair ground to believe the relator intends to make an improper use of the information he is seeking.<sup>10</sup> A creditor may also in this mode obtain inspection of corporate books, when they contain information which by law he is entitled to obtain. When by law an execution creditor of a corporation, whose lands were not sufficient to pay its debts, was allowed to issue an execution against those stockholders who had not fully paid for their stock, he was granted a *mandamus*

<sup>1</sup> Q. v. Lambourn V. R. R., 22 Q. B. Div. 463.

<sup>2</sup> Hatch v. City Bank, 1 Rob. 470; Sage v. Lake Shore, etc. R. R., 70 N. Y. 220.

<sup>3</sup> People v. Walker, 9 Mich. 328; Sage v. Lake Shore, etc. R. R., 70 N. Y. 220.

<sup>4</sup> King v. Merchants' T. Co., 2 Barn. & Ad. 115.

<sup>5</sup> Com. v. Phoenix Iron Co., 105 Pa. St. 111.

<sup>6</sup> People v. Walker, 9 Mich. 328.  
<sup>7</sup> Phoenix Iron Co. v. Com., 113 Pa. St. 563.

<sup>8</sup> People v. Northern P. R. R., 18 Fed. Rep. 471.

<sup>9</sup> King v. Merchants' T. Co., 2 Barn. & Ad. 115.

<sup>10</sup> State v. Einstein, 46 N. J. L. 479.

to compel the corporation to let him inspect its register of shareholders.<sup>1</sup> A corporation cannot refuse such inspection because it does not keep proper books, and has other entries and transactions therein. It must allow an inspection of such books as it does keep of transactions, which a stockholder has a right to know.<sup>2</sup> Though a corporation must keep account books at its office in the state of its creation, open to the inspection of all its stockholders, yet so long as it is lawful for it to do business in another state it may keep the necessary books there, and it suffices if monthly statements are sent to the home office, which are properly entered and are open to the inspection of all the stockholders.<sup>3</sup> When, however, a stockholder is entitled to such inspection by statute as a matter of right, he need assign no reason for his request.<sup>4</sup> A director of a corporation, being one of the officers who conduct and manage its affairs, is entitled of right to an inspection of its books and need assign no reason for his wish to do so.<sup>5</sup>

<sup>1</sup> *Q. v. Derbyshire, etc. R. R.*, 3 El. & Bl. 784.

<sup>2</sup> *People v. Pacific M. S. Co.*, 50 Barb. 280.

<sup>3</sup> *Pratt v. Meriden C. Co.*, 35 Conn. 36.

<sup>4</sup> *State v. St. Louis, etc. R. Co.*, 29 Mo. Ap. 301; *State v. Sportsman's, etc. Assoc.*, 29 Mo. Ap. 326; *Winter v. Baldwin*, 89 Ala. 483; *Foster v. White*, 86 Ala. 467; *Lyon v. American Screw Co.*, 16 R. I. 472. A state constitution required a corporation to keep a list of stockholders open to the inspection of stockholders and creditors. The court declared that it did not say that such list could be copied, and, even if it did say so, it could only be done for a reasonable and proper purpose. The relator said he wished to confer with the other stockholders about suing to set aside a lease made by the company. The court said a

*mandamus* would not go at the caprice of the curious or suspicious, and denied the writ. *Com. v. Empire P. R. R.*, 134 Pa. St. 237. Where the statute allowing the inspection of the books of a private corporation by its stockholders did not include the book of which an inspection was sought, the general rule, that a good motive for the inspection must be shown, was held to apply. *Lyon v. American Screw Co.*, 16 R. I. 472. Where the statute allowed a stockholder to inspect the corporate books, it was held that it was not necessary for him to negative the existence of an improper motive in his pleadings, since such improper motive was a matter of defense. *Foster v. White*, 86 Ala. 467.

<sup>5</sup> *People v. Mott*, 1 How. Pr. 247; *People v. Throop*, 12 Wend. 183.



**§ 162. Mandamus lies to common carriers to prevent discrimination.**— This writ has often been used to compel common carriers, and other corporations subject to similar obligations, to discharge the duty imposed upon them by the statutory or common law of treating all persons alike, of extending to all without discrimination the use of their services, or of their appliances or property.<sup>1</sup> It has been used: to compel telephone companies to put telephones in private offices and to furnish the like service to all parties;<sup>2</sup> to compel a railroad company to issue to relator a commutation ticket, which they refused to do on account of another transaction;<sup>3</sup> to compel a gas company to furnish gas upon the payment of all money due them from the applicant;<sup>4</sup> to compel an irrigation company to furnish water to those coming within the class of the community for whose alleged benefit it was created,<sup>5</sup> and to compel a railroad company to carry freight for all on the same terms.<sup>6</sup> This writ may also be used under similar circumstances against those who have by its use impressed their property with a public use. This subject has been already considered.<sup>7</sup>

**§ 163. Mandamus will not lie to a private corporation when there is another remedy.**— When there is another adequate remedy, a *mandamus* will not run against a private corporation, in accordance with the general principles governing its issuance. A private corporation will not be

<sup>1</sup> State v. Delaware, etc. R. R., 48 N. J. L. 55; Central, etc. Co. v. State, 118 Ind. 194.

<sup>2</sup> State v. Nebraska Tel. Co., 17 Neb. 126; Hockett v. State, 105 Ind. 250; Central, etc. Co. v. State, 118 Ind. 194; Central, etc. Co. v. State, 123 Ind. 113.

<sup>3</sup> State v. Delaware, etc. R. R., 48 N. J. L. 55.

<sup>4</sup> People v. Manhattan, etc. Co., 45 Barb. 136.

<sup>5</sup> Price v. Riverside, etc. Co., 56 Cal. 431.

<sup>6</sup> People v. New York, etc. R. R., 28 Hun, 543. This has been denied on the ground that by its charter such carriage was not compulsory. Robins, Ex parte, 3 Jur. 103. As to a private party it has been held that an action for damages was a sufficient remedy (People v. New York, etc. R. R., 22 Hun, 533), but that the state might have a *mandamus*. 28 Hun, 543.

<sup>7</sup> Ante, §§ 25, 26.

required to pay a dividend it has declared, since an action at law is an adequate remedy;<sup>1</sup> nor will a railroad company be thus compelled to receive and transport freight without charging discriminating rates, when the statute makes it liable to the party injured thereby in double the overcharge.<sup>2</sup>

**§ 164. Mandamus will not go against a private corporation when it is financially unable to do the act desired.—**

A *mandamus* was refused to compel the completion of a railroad according to charter, when the corporation had faithfully expended all the money it was allowed to raise, and its power to condemn lands had expired.<sup>3</sup> A railroad company was not required to build a bridge over its track, when it had no power to borrow money, and its share capital was spent and its borrowing powers were exhausted.<sup>4</sup> It has been asserted that when a corporation is wholly unable to discharge its duties to the public, a *quo warranto* and not a *mandamus* is the proper remedy.<sup>5</sup>

**§ 165. Mandamus to compel officers of private corporations to discharge their duties.—**The writ of *mandamus* may be used to compel the officers of private corporations to discharge the duties incumbent upon them. They have been thus required to call an election of their successors in office as provided by law,<sup>6</sup> in the mode prescribed by their by-laws, when the law made it incumbent on them so to

<sup>1</sup> *People v. Central, etc. Co.*, 41 Mich. 166.

<sup>2</sup> *State v. Mobile, etc. R. R.*, 59 Ala. 321.

<sup>3</sup> *Q. v. London, etc. R. R.*, 16 Ad. & E. (N. S.) 864.

<sup>4</sup> *Bristol, etc. R. R., In re*, 3 Q. B. Div. 10. Where an application was made to compel a turnpike company to fence its road through A.'s grounds where it had constructed it, and the company returned that it had no funds, the court granted the writ, stating that the company should not have taken the ground

unless it had funds to fence it, and that if it did anything it should do all. *Q. v. Luton Roads (Trustees)*, 1 A. & E. (N. S.) 812. Of course such a writ cannot be enforced, but in proceedings thereunder for contempt in disobeying the writ, the court can consider the question of impossibility and the prior actions of the officers of the company.

<sup>5</sup> *Ohio, etc. R. R. v. People*, 120 Ill. 200.

<sup>6</sup> *State v. Lady Bryan M. Co. (Bd. Trustees)*, 4 Nev. 400.

do,<sup>1</sup> and the failure to adopt a by-law on the subject did not prevent the issuance of the writ.<sup>2</sup> An unreasonable postponement of an election, required by law to be held annually, is equivalent to a failure to call such election.<sup>3</sup> Where a law plainly required the board of trustees of a canal company to pay interest on its stock, and it was admitted they had sufficient money for the purpose, a *mandamus* was issued to compel them to make such payment.<sup>4</sup> This writ has been issued to compel: the master to put the corporate seal to a presentation to a living;<sup>5</sup> the keepers thereof to put the common seal of a university to the instrument of appointment of its high steward;<sup>6</sup> the warden of a college to put its common seal to its answer in a suit, though such answer was contrary to his own separate answer in that suit;<sup>7</sup> and an officer to deliver up the books, papers, accounts, etc., of the corporation to his successor in office or to the corporation itself.<sup>8</sup> Where its secretary bought books for a corporation and entered therein its minutes, and its subscriptions were entered there also, he was not allowed to retain them when he went out of office, though the corporation had not paid him therefor. The books had become corporate books. He had bought the books for the corporation and looked to it to pay him therefor.<sup>9</sup>

§ 166. *Mandamus to restore to membership in private corporations.*—The writ of *mandamus* has often been used to compel private corporations to restore to membership corporators whom they have wrongfully disfranchised or suspended.<sup>10</sup> As a general rule the power to disfranchise a

<sup>1</sup> State v. Wright, 10 Nev. 167.

<sup>2</sup> People v. Cummings, 72 N. Y. 433.

<sup>3</sup> Mottu v. Primrose, 23 Md. 482.

<sup>4</sup> State v. Wabash, etc. Canal (Trustees), 4 Ind. 495.

<sup>5</sup> Q. v. Kendall, 1 Q. B. 366.

<sup>6</sup> Rex v. Cambridge (V. Chan.), 3 Burr. 1647.

<sup>7</sup> Rex v. Windham, Cowp. 377.

<sup>8</sup> Fasnacht v. German L. Assoc.,

99 Ind. 133; St. Luke's Church v. Slack, 7 Cush. 226; Rex v. Wildman, 2 Stra. 879; State v. McCullough, 3

Nev. 202; Anon., 1 Barn., K. B. 402.

<sup>9</sup> State v. Goll, 32 N. J. L. 285.

<sup>10</sup> Burt v. Grand Lodge Masons, 66 Mich. 85; Crocker v. Old South Society, 106 Mass. 489; Fritz v. Muck, 62 How. Pr. 69; Med. etc. Soc. v. Weatherly, 75 Ala. 248; Sibley v. Cartaret Club, 40 N. J. L. 295; Black,

corporator, unless it be expressly conferred by statute, extends only to three causes: 1. For infamous offenses, and then only after a conviction by a court of law. 2. For offenses against the corporation itself, which tend to its destruction. 3. For offenses of a mixed nature, which are compounded of the two first named.<sup>1</sup> It is also considered that, where the power of disfranchisement is conferred on a corporation by general terms, its power is no greater than that conceded as inherent in all corporations, as just mentioned.<sup>2</sup> A joint-stock company, or one owning property, cannot expel a member or forfeit his stock for any cause, unless such power is expressly conferred on it by its charter.<sup>3</sup> When a court is called upon to restore by *mandamus* a person to his membership in a corporation, it will only inquire whether the cause or ground of disfranchisement is legally sufficient, and whether the proceedings were regular according to, and tested by, the charter and by-laws of the corporation.<sup>4</sup> If such facts exist, the court will not interfere, as it will not review the merits of the case,

etc. Soc. v. Vandyke, 2 Whart. 309; People v. Mechanics' Aid Soc., 22 Mich. 86; Screwmen's B. Assoc. v. Beason, 76 Tex. 552; Allnutt v. Subsidiary, etc. Court, 62 Mich. 110. *Contra*: If expelled wrongfully from a religious corporation, a *mandamus* to restore him to membership will not lie, since he has a right of action against any persons interfering with his rights. People v. German, etc. Church, 53 N. Y. 103. A corporator entitled to divide a certain part of the profits of the corporation was suspended till he paid a certain fine. A *mandamus* to restore him to his membership was refused, because he might have an action against those who might disturb him in the reception of his share of the profits. King v. Free Fishers (Company), 7 East, 353.

<sup>1</sup> Evans v. Philadelphia Club, 50 Pa. St. 107; Mulroy v. Knights of Honor, 28 Mo. Ap. 463; White v. Brownell, 2 Daly, 329; People v. N. Y. Com. Assoc., 18 Abb. Pr. 271; Com. v. St. Patrick B. Assoc., 2 Binn. 441.

<sup>2</sup> State v. Chamber of Commerce, 20 Wis. 63.

<sup>3</sup> Evans v. Philadelphia Club, 50 Pa. St. 107; People v. N. Y. Com. Assoc., 18 Abb. Pr. 271; Long Island R. R., In re, 19 Wend. 37. This is not the general view as to benevolent corporations which own property for their own use. See §§ 49, 167.

<sup>4</sup> Med. etc. Soc. v. Weatherly, 75 Ala. 248; Com. v. German Society, 15 Pa. St. 251; Barrows v. Mass. Med. Soc., 12 Cush. 402.

but will allow the action of the corporation to be conclusive in that matter.<sup>1</sup> In *mandamus* proceedings to restore a person expelled from a corporation, the court will consider the legality of the action of the corporation, and in so doing will construe the by-law under which it acted in making the expulsion.<sup>2</sup> When a by-law is unreasonable, the courts will declare it to be void, and all proceedings thereunder to be invalid.<sup>3</sup> In construing such by-laws, the court will interpret them reasonably, if possible, not scrutinizing their terms for the purpose of making them void, nor holding them invalid, if every particular reason for them does not appear.<sup>4</sup> The by-laws will not be sustained, unless they are reasonable and adapted to the purposes of the corporation.<sup>5</sup> A member of a corporation cannot be disfranchised, though a by-law of a corporation may so provide: for uttering false and malicious charges against, or vilifying, another member,<sup>6</sup> since the corporation has nothing to do with private quarrels; for not submitting his business controversies with other members to arbitration,<sup>7</sup> for every one has a right to resort to the courts of the land for the enforcement of his rights; for not paying increased dues of membership, which had been so increased after the corporation had ceased to be operative, and when there

<sup>1</sup> *Leech v. Harris*, 2 Brewst. 571; *Patrick B. Society*, 2 Binn. 441; *Society for Visit. v. Com.*, 52 Pa. St. 125; *Med. etc. Soc. v. Weatherly*, 75 Ala. 248; *Com. v. Pike B. Soc.*, 8 Watts & S. 247; *Anacosta Tribe v. Murbach*, 13 Md. 91; *Com. v. German Soc.*, 15 Pa. St. 251; *Black, etc. Soc. v. Vandyke*, 2 Whart. 309; *King v. Cambridge (Chan.)*, 6 T. R. 89.

<sup>2</sup> *Hibernia F. E. Co. v. Com.*, 93 Pa. St. 264.

<sup>3</sup> *People v. Medical Society*, 24 Barb. 570.

<sup>4</sup> *Mulroy v. Knights of Honor*, 28 Mo. Ap. 463; *Com. v. St. Patrick B. Assoc.*, 2 Binn. 441; *Fuller v. Plainfield A. School*, 6 Conn. 532.

<sup>5</sup> *State v. Georgia M. Soc.*, 38 Ga. 608; *Med. etc. Soc. v. Weatherly*, 75 Ala. 248.

<sup>6</sup> *State v. Union M. Exchange*, 2 Mo. Ap. 96; *Savannah C. Exchange v. State*, 54 Ga. 668; *State v. Chamber of Commerce*, 20 Wis. 63.

was no occasion for such increase;<sup>1</sup> for neglect of official duty in not acting on committees;<sup>2</sup> for rendering professional services for less compensation than the tariff of charges adopted by the corporation, since a by-law imposing such a tariff on the corporators is against public policy, and contrary to law;<sup>3</sup> for not taking the sacrament, though the corporation was a benevolent society, composed of the members of a certain church, because such action is contrary to the law of religious liberty;<sup>4</sup> for not paying assessments imposed on the members of the corporation by an authority existing in another jurisdiction, since no domestic corporation can subject itself or its members to such alien authority;<sup>5</sup> for mere misemployment of money as one of the guardians of the poor;<sup>6</sup> or for becoming a surety on the bond of a colored citizen, who has been elected to a public office, since such action is encouraged by the law.<sup>7</sup> In such proceedings the corporation must act in good faith, or its decree will be abrogated in a proceeding by *mandamus* to restore the expelled member.<sup>8</sup> On the other hand, when the corporation had the power of expulsion, and the by-law governing the case was reasonable and adapted to the purposes of the corporation, and the act charged was an offense against the corporation itself, the courts have refused to interfere to restore an expelled member. Where the charter of a benevolent society authorized it to expel members thereof for being engaged in scandalous or improper proceedings which might injure its reputation, the court refused to restore a member who had been expelled for altering a bill, and presenting it to the corporation as a claim

<sup>1</sup> *Hibernia F. E. Co. v. Com.*, 93 Pa. St. 264.

<sup>2</sup> *Fuller v. Plainfield A. School*, 6 Conn. 532.

<sup>3</sup> *People v. Medical Society*, 24 Barb. 570.

<sup>4</sup> *People v. Saint Franciscus, etc. Society*, 24 How. Pr. 216.

<sup>5</sup> *Lamphere v. Grand Lodge, etc.*, 47 Mich. 429.

<sup>6</sup> *Com. v. Guardians of the Poor*, 6 S. & R. 469.

<sup>7</sup> *State v. Georgia Medical Soc.*, 38 Ga. 608.

<sup>8</sup> *Mulroy v. Knights of Honor*, 28 Mo. Ap. 463; *State v. Henry Clay Lodge* (N. J., June 16, 1891), 22 Atl. Rep. 63; *Otto v. Journeymen, etc. Union*, 75 Cal. 308.

against it.<sup>1</sup> Charging a benevolent corporation with money which he had never expended for it is a good ground for the expulsion of a member, when such corporation has the power of expulsion.<sup>2</sup> A corporation, formed to establish a high moral standard among its members in conducting business operations, and to exercise some control over their trading transactions between themselves and with others, was sustained in its expulsion of a member for obtaining goods under false pretenses, because such member had violated his duty toward the corporation.<sup>3</sup> Though the by-law may be reasonable and proper, yet the members of a corporation will not be allowed, under the pretext of enforcing the by-law, to take personal or private revenge, or to make it the instrument of religious intolerance, or of political prescription; and when it appears that under a by-law so used, a person has been expelled from a corporation, the courts will restore him to his membership by a writ of *mandamus*.<sup>4</sup>

**§ 167. Will mandamus lie to restore to membership in a private corporation when no pecuniary interests are involved?**—Some courts have refused to issue a writ of *mandamus* to restore a person to his membership in a corporation when no pecuniary interest was involved. The writ is only used to protect a person from substantial injury, and the courts consider that he does not sustain any substantial injury by his loss of membership unless there was some pecuniary advantage arising to him therefrom. The franchise itself is property; the loss of membership by expulsion may be followed by very injurious indirect consequences, and the damages arising therefrom may be impossible of calculation. We think the weight of authority is in favor of the issuance of the writ in such cases.<sup>5</sup>

<sup>1</sup> Com. v. Philanthropic Society,  
5 Binn. 486.

<sup>4</sup> State v. Georgia Med. Soc., 38  
Ga. 608.

<sup>2</sup> Com. v. Guardians of Poor, 6 S.  
& R. 469.

<sup>5</sup> See § 49, where the decisions are  
reviewed.

<sup>3</sup> People v. New York C. Assoc.,  
18 Abb. Pr. 271.

§ 168. What irregularities in expelling a member of a private corporation will vitiate such expulsion when it is reviewed by mandamus.—When the proceedings of a corporation by which a corporator was expelled were irregular, as tested by its charter and by-laws, he may be restored to membership by a writ of *mandamus*.<sup>1</sup> He cannot be expelled without any notice that such a proceeding is contemplated and without full opportunity to be heard in reply to the charge against him, since such a proceeding is abhorrent to all reason.<sup>2</sup> There must be some one to inquire and determine when the facts exist which cause the forfeiture.<sup>3</sup> The expulsion of a member of a corporation

<sup>1</sup> *State v. Cartaret Club*, 40 N. J. L. 295; *People v. Musical, etc. Union*, 118 N. Y. 101.

<sup>2</sup> *Pulford v. Fire Dept.*, 31 Mich. 458; *State v. Temperance B. Ass'n*, 42 Mo. Ap. 485; *King v. Cambridge (Univ.)*, 8 Mod. 148; *Delacy v. Neuse R. W. Co.*, 1 Hawks, 274; *People v. San Franciscus, etc. Soc.*, 24 How. Pr. 216; *Mulroy v. Knights of Honor*, 28 Mo. Ap. 463.

<sup>3</sup> *Sibley v. Cartaret Club*, 40 N. J. L. 295; *Com. v. Pa. Ben. Inst.*, 2 S. & R. 141. There are a number of cases which decide that benevolent corporations which contract to pay their members a certain insurance upon their deaths, the amount whereof is collected by assessment made after the death of the party insured, may provide by their by-laws that such insurance shall be forfeited without notice for non-payment of assessments within a designated time. The courts claim that such by-laws are necessary to keep alive such organizations. *Mulroy v. Knights of Honor*, 28 Mo. Ap. 463; *Borgraefe v. Knights of Honor*, 22 Mo. Ap. 127; *Illinois, etc. Soc. v. Baldwin*, 86 Ill. 479. All such

by-laws which were adjudged to be reasonable and valid were confined to defaults on the part of the member himself. *McDonald v. Ross-Lewin*, 29 Hun, 87. Should such a by-law be presented whereby a member was *ipso facto* suspended and deprived of all claim for insurance by reason of a default of an officer of his subordinate lodge relative to remitting the funds collected to the principal officers of the corporation, or otherwise, a different question would arise and such by-law would no doubt be held to be unreasonable and void. In the case of *Peet v. Maccabees*, 83 Mich. 92, a beneficiary certificate was considered to be vitiated because the member to whom it was issued had died during the suspension of his subordinate lodge for failure of its officers to remit certain funds to the grand lodge of the order in accordance with its by-laws. In that case, however, which was decided by a divided court, the suspension of the individual members did not go into effect till thirty days after the suspension, and the court considered that it was to be supposed



has been set aside: because the objectionable words uttered at a meeting of the society for which he was expelled were not objected to or written down at the time as required by the by-laws;<sup>1</sup> he was not notified to appear and defend himself before the fine was imposed, for the non-payment of which he was expelled, his notice being to pay the fine or to show cause to the contrary;<sup>2</sup> the fine was imposed without notice, formal complaint or trial;<sup>3</sup> the fine, for non-payment of which he was expelled, was imposed without a by-law defining the offense and imposing the penalty, and he was not furnished with a copy of the charges preferred nor opportunity to be present at the taking of testimony against him, nor opportunity to offer testimony in his own behalf;<sup>4</sup> the expulsion was by a part of the corporators, whereas an expulsion must be by the body of the corporators, unless the charter otherwise provides;<sup>5</sup> the necessary proportion of the members did not vote for expulsion at the regular meeting when the matter was considered, though they so voted at a subsequent meeting;<sup>6</sup> the member was dropped without notice or opportunity to be heard.<sup>7</sup> When it appears that the member was not expelled, but restrictions were placed on his attempts to exercise certain rights claimed by him as a member of the corporation, and there is nothing to show that such restrictions were placed upon him otherwise than in the administration of the internal discipline and government of the corporation under its by-laws and rules, a *mandamus* in his

that the members of such lodge would during those thirty days become aware of the suspension of their lodge by general information, by the non-receipt of notices of assessments and at their lodge meetings.

<sup>1</sup> *People v. American Institute*, 44 How. Pr. 468.

<sup>2</sup> *People v. Benevolent Society*, 3 Hun, 361.

<sup>3</sup> *State v. Milwaukee Cham. Com.*, 47 Wis. 670.

<sup>4</sup> *Erd v. Bavarian Assoc.*, 67 Mich. 233.

<sup>5</sup> *State v. Chamber of Commerce*, 20 Wis. 63; *Evans v. Philadelphia Club*, 50 Pa. St. 107.

<sup>6</sup> *Com. v. Guardians of Poor*, 6 S. & R. 469.

<sup>7</sup> *Wachtel v. Noah Widows', etc. Soc.*, 84 N. Y. 28; *Pulford v. Fire*

behalf will not lie.<sup>1</sup> Mere irregularities, however, leading up to the expulsion, will not vitiate the conclusion reached.<sup>2</sup>

**§ 169. Expelled members must appeal to corporate appellate tribunals before they can ask for a mandamus.—**

It is generally held that, when a corporator is aggrieved by those acting with authority in a corporation, he must appeal to the appellate tribunals provided by said corporation before applying to the legal tribunals;<sup>3</sup> but he cannot be entirely prohibited from resorting to the legal tribunals.<sup>4</sup> In one case it was held that, having chosen his remedy by appeal to the corporate appellate tribunal, the party was bound by its decision. In this case such decision was unnecessary for the disposition of the case, and it seems to stand unsupported.<sup>5</sup> Where, however, the corporate authorities are without jurisdiction to try and expel the member on the charges preferred, their action is null and void, and he can at once resort to the legal tribunals to protect his rights, ignoring the corporate appellate tribunals.<sup>6</sup>

**§ 170. Mandamus to restore a member will not issue when he may be legally expelled upon his restoration.—**

When a corporator has been disfranchised by irregular proceedings, but it appears that proper grounds exist for disfranchisement, the courts in their discretion will refuse to issue the writ of *mandamus* to compel a restoration

Dept., 31 Mich. 458; Sibley v. Cartaret Club, 40 N. J. L. 295; Riddell v. Harmony F. Club, 8 Phila. 310.

<sup>1</sup> Crocker v. Old South Society, 106 Mass. 489.

<sup>2</sup> Mulroy v. Knights of Honor, 28 Mo. Ap. 463.

<sup>3</sup> Screwwmen's B. Assoc. v. Benson, 76 Tex. 552; Poultney v. Bachman, 31 Hun, 49; German R. Church v. Com., 3 Pa. St. 282; Chamberlain v. Lincoln, 129 Mass. 70; State v. Henry Clay Lodge (N. J., June 16, 1891), 22 Atl. Rep. 63; Oliver v. Hopkins, 144 Mass. 175; Karcher v. Supreme Lodge, 137 Mass. 368. *Con-*

*tra*: Supreme Council v. Garrigus, 104 Ind. 133.

<sup>4</sup> Bauer v. Samson Lodge, 102 Ind. 262; Poultney v. Bachman, 10 Abb. N. C. 252. Where the by-law provided that he should appeal to the committee which expelled him, the court considered the chance of their changing their action to be so remote that it would not require such appeal. Loubat v. Le Roy, 40 Hun, 546.

<sup>5</sup> Burt v. Michigan G. Lodge, 66 Mich. 85.

<sup>6</sup> Mulroy v. Knights of Honor, 28 Mo. Ap. 471.

to membership. This writ is only sued to accomplish the ends of justice, and to attain substantial results. In such cases the restored member might be again expelled by regular proceedings for the same offense,<sup>1</sup> since a void proceeding is no bar to a subsequent correct proceeding.<sup>2</sup> For similar reasons a corporation, which is required by law to admit to membership therein all persons possessing certain qualifications, will not be compelled by *mandamus* to admit one as a member, when it clearly appears that, if admitted, he would be at once liable to expulsion for gross ignorance or misconduct.<sup>3</sup> It has been considered that the records of the corporation must show the exact cause for the expulsion of a member, and all the proceedings necessary to authorize such action, else the court will invalidate the proceedings because it does not appear that they are legal and regular.<sup>4</sup>

**§ 171. An action for damages for expulsion from a corporation is a waiver of all right to apply for a restoration by a mandamus.**—In some cases parties expelled from membership in corporations have brought actions for the damages thereby sustained by them. Such action is based upon the theory that the plaintiff has lost his membership and all its rights, and that he cannot be restored thereto, otherwise he has no cause of action. If his rights are not gone, and gone irrevocably, his petition is not true wherein he says he has been deprived of those rights. Therefore, in order to maintain such an action, he necessarily abandons all interest in the society. It has accordingly been held that, by bringing such suit, the right to seek restitution to membership by a writ of *mandamus* is waived.<sup>5</sup>

**§ 172. Mandamus to admit to membership in private corporations.**—Where by law a party is entitled to be ad-

<sup>1</sup> People v. Anshei C. H. Cong., 37 Mich. 542; State v. Lusitanian P. Soc., 15 La. An. 73; State v. Temperance B. Ass'n, 42 Mo. Ap. 485.

<sup>2</sup> State v. Milwaukee Ch. of Commerce, 47 Wis. 670.

<sup>3</sup> Paine, Ex parte, 1 Hill, 665.

<sup>4</sup> People v. Mechanics' Aid Soc., 22 Mich. 86.

<sup>5</sup> State v. Slavonska Lipa, 28 Ohio St. 665.

mitted as a member of a private corporation, provided he possesses certain qualifications, a *mandamus* will lie to such corporation to admit to membership therein a person who possesses such qualifications.<sup>1</sup> A code of ethics adopted by such corporation prior to his admission to membership therein is no ground for the exclusion of an applicant.<sup>2</sup>

**§ 173. Mandamus to restore or to admit an officer of a private corporation.**—The power to remove one of its officers from his official position for an adequate cause is an incident inherent to every corporation;<sup>3</sup> but the exercise thereof does not affect the private rights of the corporator in the franchise.<sup>4</sup> Though the removal is irregular, the court will not grant a *mandamus* to restore the officer, unless his tenure of the office is permanent. It will not be granted where the officer may be removed by a majority vote of the corporators,<sup>5</sup> nor where there are good causes for his removal, though he was removed by irregular proceedings.<sup>6</sup> Where the power of motion from office is discretionary with the corporation, such power may be exercised without notice to the officer and without a hearing.<sup>7</sup> Where a party has been elected to an office in a private corporation, he may, by the writ of *mandamus*, compel it to admit and swear him into such office.<sup>8</sup> A *mandamus* will not lie to compel a private corporation to proceed to fill one of its offices, so long as there is a *de facto* incumbent thereof. The incumbent must first be ousted by a *quo warranto*.<sup>9</sup>

**§ 174. Mandamus to benevolent associations to pay death losses.**—In America a number of benevolent corporations have been organized which contract to pay a cer-

<sup>1</sup> Rex v. Askew, 4 Burr. 2186.

<sup>5</sup> Evans v. Hearts of Oak B. Soc.,

<sup>2</sup> People v. Medical Soc., 32 N. Y. 187.

12 Jur. (N. S.) 163.

<sup>3</sup> Evans v. Philadelphia Club, 50 Pa. St. 107; White v. Brownell, 2 Daly, 329.

<sup>6</sup> Paine, Ex parte, 1 Hill, 665.

<sup>7</sup> Livingston v. Trinity Church (Rector), 45 N. J. L. 230.

<sup>4</sup> Evans v. Philadelphia Club, 50 Pa. St. 107.

<sup>8</sup> King v. Bedford Level (Corp.),

6 East, 356.

<sup>9</sup> Harrison v. Simonds, 44 Conn.

318.

tain sum of money to designated parties upon the death of a corporator. These corporations possess no capital, but procure the money required to pay such death losses by assessments on all the corporators. The assistance of the writ of *mandamus* has often been sought to compel such corporations to levy assessments on their members in order to pay such losses. When the corporation denies all liability, a suit must first be brought to determine the liability, and then a *mandamus* may be obtained to compel the corporation to levy an assessment to pay such judgment.<sup>1</sup> When the contract is an agreement to pay a certain sum of money, a suit therefor is an adequate legal remedy.<sup>2</sup> When the agreement is to pay the amount of an assessment, not exceeding a certain sum, a suit must first be brought to determine the amount of the liability.<sup>3</sup> Since a *mandamus* does not lie to enforce a private contract, a suit must be brought on the contract,<sup>4</sup> but when the local law allows it, a *mandamus* to compel the levy of the amount ascertained to be due may be asked for in such suit.<sup>5</sup> A corporation cannot by the form of its contract confer original jurisdiction on a court to enforce it by a *mandamus* proceeding.<sup>6</sup> The right to issue a *mandamus* to collect such claims can only be sustained on the theory that it is the legal duty of a corporation to pay its debts, and the courts will enforce such duties by compelling such corporation to exercise its powers to obtain such money in the mode provided therefor. When the by-laws of such corporation provide that the members shall be subject to but one assessment for each death loss, a *mandamus* will not lie to levy a second assessment when the first assessment has not realized money enough to pay the death loss in full.<sup>7</sup>

<sup>1</sup> *Burland v. Northwestern, etc. Assoc.*, 47 Mich. 424.

<sup>5</sup> *Harl v. Pottawattamie, etc. Co.*, 74 Iowa, 39.

<sup>2</sup> *Excelsior, etc. Assoc. v. Riddle*, 91 Ind. 84.

<sup>6</sup> *Burland v. Northwestern, etc. Assoc.*, 47 Mich. 424.

<sup>3</sup> *Burland v. Northwestern, etc. Assoc.*, 47 Mich. 424.

<sup>7</sup> *People v. Masonic, etc. Ass'n*, 126 N. Y. 615.

<sup>4</sup> *Bates v. Detroit, etc. Assoc.*, 47 Mich. 646.

§ 175. If a private corporation has a visitor, a *mandamus* lies only when he fails to act.—The writ of *mandamus* is never granted where there is another adequate remedy, nor when there is another tribunal or person with authority to give the proper redress. Visitors of corporations have power to keep them within the legitimate sphere of their operations and to correct all abuses of authority and to nullify all irregular proceedings. In America there are very few corporations which have private visitors, and in the absence of such the state is the visitor of all corporations. In England the founder of an eleemosynary corporation and his heirs and assigns are its visitors, while the king, who acts through the common-law courts, is the visitor of civil corporations, unless a visitor is expressly appointed, and the ordinary is the visitor of all spiritual corporations.<sup>1</sup> The private laws of a corporation are to be judged by the visitor thereof, and the courts will not interfere in such cases,<sup>2</sup> as: to restore a person to his fellowship in a college,<sup>3</sup> to admit one chosen by a majority of the fellows to the mastership of a college,<sup>4</sup> and to admit one to the chaplaincy of an asylum whom the visitors had removed and to pay him the arrears of his salary.<sup>5</sup> When a visitor declines to hear an appeal, a *mandamus* will issue to compel him to hear it. When he has acted his judgment is final.<sup>6</sup> When a corporate duty devolves upon a person who is also the visitor of the corporation, the duty may be enforced by a writ of *mandamus* as though there were no visitor.<sup>7</sup> The

<sup>1</sup> 1 Black. Com., 480, 481, 482; Rex v. Chester (Epis.), Stra. 797; Rex v. Chester (Bishop), 1 Wils. 206; Parkinson's Case, 3 Mod. 265; King v. St. Catharine's Hall, 4 T. R. 233.

<sup>2</sup> Walker's Case, Cas. Temp. Hard. 212; Q. v. Chester (Dean), 15 Q. B. 513.

<sup>3</sup> Parkinson's Case, 3 Mod. 265; Appleford's Case, 1 Mod. 82; Dr. Widdington's Case, 1 Lev. 23; King v. New College, 2 Lev. 14.

<sup>4</sup> Dr. Patrick's Case, 1 Keb. 286, 833, 1 Lev. 65, 2 Keb. 65.

<sup>5</sup> Q. v. Middlesex (Just.), 2 Ad. & E. (N. S.) 433.

<sup>6</sup> King v. Worcester (Bishop), 4 M. & S. 415; 6 Bacon's Ab., Title "Man." C. 2; Per Lord Holt in Phillips v. Bury, 2 T. R. 346; King v. Ely (Bishop), 5 T. R. 475.

<sup>7</sup> Rex v. Chester (Epis.), Strange 797.

visitor's duties are confined to the enforcement of the private laws of the corporation. When the laws of the land are disobeyed, the courts will take cognizance of the matter. A *mandamus* was issued to the officers of a college to compel them to remove fellows thereof who had failed to take a certain oath, as required by the law of the land.<sup>1</sup>

§ 176. **Mandamus issues in ecclesiastical matters only when property rights are affected.**—Applications have often been made to the courts for writs of *mandamus* relative to the acts of ecclesiastical tribunals. Since in America there is no connection between church and state, the courts have no direct control over them as official bodies or as officers, so the writ of *mandamus* will not run to them. But their actions may come in question where private corporations have subjected themselves by their charters to the decisions of certain ecclesiastical tribunals, and the writ of *mandamus* is sought to compel such private corporation to take action contrary to the decisions of such tribunals. Since such corporations are by their charters subject to such ecclesiastical tribunals, it is the duty of their officers to obey the decrees emanating therefrom. When members of such corporations ask for a writ of *mandamus* to prevent the enforcement of such decrees, the courts inquire first whether any rights of property of the relator are involved. The courts will not interfere unless the relator's rights of property will be affected by such action.<sup>2</sup> Though the relator's rights of property are involved in the proposed action, yet the judgment of the ecclesiastical tribunal is conclusive as to purely ecclesiastical offenses, if it had jurisdiction in the premises under the laws of the church organization which created it.<sup>3</sup> The courts will not review the decisions of

<sup>1</sup> R. v. St. John's College, 4 Mod. 233. Walker v. Wainwright, 16 Barb. 486; Connitt v. Reformed, etc.

<sup>2</sup> Livingston v. Trinity Church (Rector), 45 N. J. L. 230; Bouldin v. Hebrew Congreg., 31 La. An. 205; Alexander, 15 Wall. 131; Sale v. Baptist Church, 62 Iowa, 26. German Reformed Church v. Com., 3 Pa. St. 282.

<sup>3</sup> Chase v. Cheney, 58 Ill. 509;

ecclesiastical tribunals, nor inquire whether such decisions were justified by the truth of the case.<sup>1</sup> Such church tribunals are the best judges of what constitutes an offense against the word of God and against the discipline of the church.<sup>2</sup> Their decisions are also conclusive on doubtful and technical questions, involving a criticism of the canons, even though they may comprise jurisdictional facts.<sup>3</sup> The regularity of their proceedings will not be inquired into by the courts, since every competent tribunal must of necessity regulate its own formulas,<sup>4</sup> and the decree will be accepted as conclusive proof of the matters therein contained.<sup>5</sup> The converse of these propositions is, that when property rights are involved and the church did not have jurisdiction under the rules of the church in the matter, the courts will issue the writ of *mandamus* in proper cases to prevent the enforcement of such decrees, provided the cases are such as fall within the principles under which such writs are issued.

§ 177. **Mandamus to a foreign corporation.**—Whether a writ of *mandamus* will run against a foreign corporation seems to be a questionable proposition. Under the common law the officers of a foreign corporation did not represent the corporation and were not recognized as such.<sup>6</sup> The attorneys or agents of such corporations, however, are recognized as such.<sup>7</sup> Where the state statute was broader than the common law, and authorized the use of the writ of *mandamus* to restore a person to the use and enjoyment

<sup>1</sup> *State v. Farris*, 45 Mo. 183; *Grosvenor v. United Society*, 118 Mass. 78; *Walker v. Wainwright*, 16 Barb. 486; *Harmon v. Dreher*, 1 Speer's Eq. Cas. 87; *State v. Hebrew Congreg.*, 31 La. An. 205; *Connitt v. Reformed, etc. Church*, 54 N. Y. 551.

<sup>2</sup> *German R. Church v. Com.*, 3 Pa. St. 282.

<sup>3</sup> *Chase v. Cheney*, 58 Ill. 509.

<sup>4</sup> *Harmon v. Dreher*, 1 Speer's Eq. Cas. 87.

<sup>5</sup> *Bouldin v. Alexander*, 15 Wall. 131; *Shannon v. Frost*, 3 B. Mon. 253.

<sup>6</sup> *McQueen v. Middleton M. Co.*, 16 John. 5; *State v. Penn. R. R.*, 42 N. J. L. 490; *State v. McCullough*, 3 Nev. 202.

<sup>7</sup> *State v. McCullough*, 3 Nev. 202; *McQueen v. Middletown M. Co.*, 16 John. 5.



of a right from which he was unlawfully precluded by another person, such writ was issued to enable the agent of a foreign corporation to represent it instead of another person who claimed to be the proper representative.<sup>1</sup> But it has been decided that the rule of the common law is obsolete, and the writ of *mandamus* was issued against a foreign corporation doing business in the state, and was served on its officers within the state.<sup>2</sup>

<sup>1</sup>State v. McCullough, 3 Nev. 202.   <sup>2</sup>State v. Penn. R. R., 42 N. J. L. 490.

## CHAPTER 13.

### MANDAMUS TO CANVASSERS OF ELECTIONS.

- § 178. The duties of canvassing boards are ministerial.
179. When the canvassing board may reject, and when they must count, votes.
180. Will any evidence be received except the returns when a *mandamus* is asked for against the canvassers of an election?
181. A *mandamus* will issue to compel the proper officer to declare the result of the election.
182. *Mandamus* will issue to the canvassing board though they have already given another the certificate.
183. The peremptory writ will specifically direct the canvassing board what to do.
184. *Mandamus* will not lie when another remedy or the board had discretion or the writ was illegal.
185. By *mandamus* the canvassing board may be required to reconvene and do their duty, though they have adjourned *sine die*.

§ 178. The duties of canvassing officers are ministerial.—The writ of *mandamus* has often been used to compel the performance of their duties by those officers who have had charge of elections and of the declaration of the results thereof. Such duties are very important and are vitally connected with the well-being of a republic, wherein the whole governmental forces are controlled by the results of elections. The law has wisely left but little to the discretion of such officers, and has thereby subjected them to the supervision and control of the courts. It may be stated, as an almost invariable rule, that the duties of judges of elections and of canvassing boards are purely ministerial, and that the writ of *mandamus* lies to compel the proper performance thereof.<sup>1</sup> Where the system of registering

<sup>1</sup> Wiliford v. State, 43 Ark. 62; 325; Jayne v. Drorbaugh, 63 Iowa, Dalton v. State, 43 Ohio St. 652; 711; State v. Williams, 95 Mo. 159; Calaveras (Co.) v. Brockway, 30 Cal. Mackey, Ex parte, 15 S. C. 322;

voters prior to the election has been adopted, the register of voters may be compelled by *mandamus* to register those applying therefor, who possess the qualifications required by law for registration,<sup>1</sup> or to place one's name on the voter's list when it has been improperly left off such list,<sup>2</sup> or to restore one to the registration list whose name has been improperly stricken therefrom,<sup>3</sup> unless such registering officers have been granted judicial power in such matters.<sup>4</sup>

§ 179. **When the canvassing board may reject, and when they must count, votes.**—In the various cases of *mandamus* which have arisen in connection with elections, the courts seem to have made no distinction in their rulings between the acts of the judges of the precincts, who receive and count the votes, and the acts of the boards canvassing the returns, since the writ is only applicable to their ministerial acts, which in such cases are very similar; and herein we will also refer to them indifferently in all cases as canvassing boards. It is the duty of a canvassing board to canvass all the votes cast.<sup>5</sup> Though their duties are considered to be ministerial, yet certain of such duties are so far discretionary or judicial, that the courts will not interfere therein by *mandamus*; or, if they be considered to be ministerial, yet they are not plain, and the writ only runs relative to plain ministerial duties. Where a ballot was so marked that it required some judgment and discretion to

Lyman v. Martin, 2 Utah, 136; Clark v. McKenzie, 7 Bush, 523; State v. Gibbs, 13 Fla. 55; Heath, Ex parte, 3 Hill, 42; Lewis v. Marshal Co. (Com'rs), 16 Kans. 102; Kislner v. Cameron, 29 Ind. 488; State v. Stearns, 11 Neb. 104; People v. Hilliard, 29 Ill. 413; Leigh v. State, 69 Ala. 261; Clark v. Board Examiners, 126 Mass. 282; Luce v. Mayhew, 13 Gray, 83; Smith v. Lawrence (S. Dak., June 19, 1891), 49 N. W. Rep. 7.

<sup>1</sup> Davies v. McKeeby, 5 Nev. 369.

<sup>2</sup> McCulloch et al., Re, 35 Up. Can. (Q. B.) 449; Glalon v. Fairbairn, 30 Low. Can. Jurist, 323; 31 id. 48.

<sup>3</sup> Lamar v. Wilkins, 28 Ark. 34.

<sup>4</sup> Freeman v. New Haven (Selectmen), 34 Conn. 406; Weeden v. Richmond (Town Council), 9 R. I. 128.

<sup>5</sup> State v. Hodgeman Co. (Com'rs), 23 Kan. 264; People v. Grand Co. (Com'rs), 6 Colo. 202; State v. Stearns, 11 Neb. 104; State v. Peacock, 15 Neb. 442; Privett v. Stevens, 25 Kan. 275.

determine whether it had been scratched, the court refused to review, in a *mandamus* proceeding, the action of the canvassing board thereon.<sup>1</sup> The same conclusion was reached relative to the determination of the board as to whether a certain word in the returns was forty or fifty.<sup>2</sup> A statement on the returns void on its face may be rejected by the canvassers;<sup>3</sup> and they should reject ballots which are void on their faces,<sup>4</sup> or which do not conform to the plain provisions of the law,<sup>5</sup> and they may correct a mere clerical mistake in the footings which is apparent on the face of the returns.<sup>6</sup> A *mandamus* was refused to compel a canvassing board to count certain returns as the election returns from a particular town, when such returns did not show in what year nor in what town the election was held, and when they did not appear to be a copy of the record of the town meeting.<sup>7</sup> A canvassing board must decide whether the returns submitted to them are genuine, intelligible, and properly authenticated;<sup>8</sup> and it has been considered that such papers must bear on their face substantially whatever the law has prescribed for their authentication as such returns;<sup>9</sup> but so strong is the disposition to confine the action of canvassing boards to the mere ministerial duties of counting the votes and certifying the result, and the unwillingness to accord to them any discretionary duties, that they have been denied the right to reject any returns unless they are absolutely so uncertain in their form and nature that they cannot be known as such, or the statement of the number of votes received by any person or object is so confused, or indefinite, or uncertain, that it can-

<sup>1</sup> State v. Deane, 23 Fla. 121.<sup>6</sup> Dalton v. State, 43 Ohio St. 652.<sup>2</sup> State v. Bailey, 7 Iowa, 390.<sup>7</sup> Luce v. Dukes Co., 153 Mass.<sup>3</sup> State v. State Canvassers, 36 Wis. 498.

108; 26 N. E. Rep. 419.

<sup>4</sup> Oglesby v. Sigman, 58 Miss. 502.<sup>8</sup> State v. Marks, 74 Tenn. 12;

State v. Gibbs, 13 Fla. 55.

<sup>5</sup> People v. Onondaga Co. (Board Canvassers, N. Y., Dec. 29, 1891), 29 N. E. Rep. 327.<sup>9</sup> Simon v. Durham, 10 Oreg. 52;

Luce v. Mayhew, 13 Gray, 83; State v. Randall, 35 Ohio St. 64.

not be ascertained with sufficient clearness.<sup>1</sup> In fact it is asserted, that the return must be an absolute nullity, a thing void of all substance, with nothing in it, to allow the canvassers to reject it; that, since such action will disfranchise the voters of a precinct, the courts will, as far as it may be without violence to the clear legislative intent, so construe election laws as to avert the disfranchisement of the legal electors of a precinct through the ignorance, neglect or fraud of election officers.<sup>2</sup> So if the returns upon their face are sufficiently authentic to show that they are genuine,<sup>3</sup> or when they are known to be the proper returns, the canvassers cannot pass on their sufficiency, and they must be counted.<sup>4</sup> The latter decisions are more in harmony with the necessities of the case. These duties are performed by men unlearned in the law, and during the hurry of an election; and though a certain amount of discretion is allowed to such officers,<sup>5</sup> yet such duties are considered to be ministerial and are reviewable by the writ of *mandamus*, and the least discretion possible should be allowed to such officers, and the true intent of the voters should be sustained so far as practicable. Such returns are not to be invalidated because they include more than the law requires.<sup>6</sup> The additional statements must be rejected as surplusage.<sup>7</sup> They can never be used to contradict the return itself.<sup>8</sup> When it was sought to compel the secretary of state to return certain resolutions and papers, sent to him with the election returns, and to cause him to abstain and refrain from allowing such papers to be brought before the state board of canvassers, the writ was refused, because, such

<sup>1</sup> State v. Bailey, 7 Iowa, 390; Drew v. McLin, 16 Fla. 17; State v. Hudmon v. Slaughter, 70 Ala. 546; Gibbs, 13 Fla. 55; Long v. State, 17 State v. State Canvassers (Board), Neb. 60.

17 Fla. 29.

<sup>2</sup> Dalton v. State, 43 Ohio St. 652.

<sup>3</sup> State v. Peacock, 15 Neb. 442.

<sup>4</sup> State v. Marshall Co. (Judge), 7 Iowa, 186.

<sup>5</sup> State v. Foster, 38 Ohio St. 599; 498.

<sup>6</sup> State v. Berg, 76 Mo. 136.

<sup>7</sup> Heath, Ex parte. 3 Hill, 43; State v. Berg, 76 Mo. 136; Dalton v. State, 43 Ohio St. 652.

<sup>8</sup> State v. State Canvassers, 36 Wis.

papers not being proper parts of the return, the secretary of state had no official duty relative to them, and was at liberty to burn or destroy them as waste paper.<sup>1</sup> The board of county canvassers may be compelled by this writ to return the election returns to the board of inspectors for the correction of certain clerical errors.<sup>2</sup> When it appears in a *mandamus* proceeding that certain returns, though on their face proper and valid, are the result of illegal action on the part of the canvassing board which prepared them, by which it departed from its sphere as a ministerial body, and in excess of its jurisdiction made an illegal or erroneous canvass, the superior canvassing board may be required to canvass without regard to such returns.<sup>3</sup> When the secretary of a board of canvassers refuses to attest its action as required by law, it may appoint a secretary *pro tempore* to do so, since it has by law power to make the canvass and certify its work.<sup>4</sup> The canvassing board cannot reject the returns or refuse to sign a certificate of election, because illegal votes were received or other frauds or irregularities were practiced at the election.<sup>5</sup> They will be required by this writ to correct clerical errors on their part, which are apparent on the books from which they canvassed.<sup>6</sup> Since their duties are confined to counting the votes and certifying the result, they cannot refuse to count the votes cast for a candidate for a certain office, because another officer failed to include such office in his proclamation relative to the election.<sup>7</sup> They cannot seek evidence *aliunde* to sus-

<sup>1</sup> *People v. Rice* (N. Y., Dec. 29, 1891), 29 N. E. Rep. 355.

<sup>2</sup> *People v. Onondaga Co. (Bd. Co. Com'rs*, N. Y., Dec. 29, 1891), 29 N. E. Rep. 361.

<sup>3</sup> *People v. State Canvassers (Bd.*, N. Y., Dec. 29, 1891), 29 N. E. Rep. 355. In this case allegations to this effect were contained in the petition, and they were not denied, nor even alluded to in the return.

<sup>4</sup> *People v. State Canvassers (Bd.*, N. Y., Dec. 29, 1891), *supra*.

<sup>5</sup> *Lewis v. Marshall Co. (Com'rs)*, 16 Kans. 102; *Com. v. Emminger*, 74 Pa. St. 479; *Dalton v. State*, 43 Ohio St. 652; *Burke v. Monroe Co. (Sup'rs)*, 4 W. Va. 371; *Peck v. Weddell*, 17 Ohio St. 271; *Privett v. Stevens*, 25 Kans. 275; *Smith v. Lawrence* (S. Dak., June 19, 1891), 49 N. W. Rep. 7.

<sup>6</sup> *State v. Hill*, 20 Neb. 119.

<sup>7</sup> *Morgan v. Pratt Co. (Com'rs)*, 24 Kans. 71.

tain or overthrow the returns.<sup>1</sup> Their action is to be carefully confined to an examination of the papers before them, and a determination of the result therefrom in the light of such facts of public notoriety connected with the election as every one takes notice of, and which may enable them to apply such ballots as are in any respect imperfect to the proper candidates or officers for which they are intended, provided the intent is sufficiently indicated by the ballot in connection with such facts, so that extraneous evidence is not necessary for this purpose.<sup>2</sup>

§ 180. Will any evidence be received except the returns, when a mandamus is asked for against the canvassers of an election.—Since the office of a *mandamus* is to compel an officer to do what was his duty without the *mandamus*, it is claimed to be a universal rule that a court in such a proceeding will not hear evidence of any fact, affecting a return, which the canvassers are called upon to canvass and abstract.<sup>3</sup> It would seem to be inconsistent to adjudge officers as derelict in duty, when such duty proceeded from matters which were not within their knowledge, since they were prevented from considering anything but the papers before them and matters of general notoriety. In one case, where it appeared that an alteration had been made in the return of the votes, but the canvassers did not know whether such alteration was made before or after they received the returns, the court heard evidence on the sub-

<sup>1</sup>State v. State Canvassers, 36 Wis. 498; Dalton v. State, 43 Ohio St. 652. In State v. Kavanagh, 24 Neb. 506, the canvassing board received affidavits and oral testimony concerning an alteration of the returns and then rejected them, and were sustained in such action by the court.

<sup>2</sup>Cooley's Const. Lim., 623; State v. Foster, 38 Ohio St. 599; State v. Williams, 95 Mo. 159; State v. Dinsmore, 5 Neb. 145. *Contra*, Clark

v. Board of Examiners, 126 Mass. 282, where a board of canvassers were not allowed to count votes cast for L. Clark in favor of Leonard Clark, because they were confined to the record of the votes returned and laid before them. In similar cases another court decided that the action of the canvassing board would not be controlled. State v. Foster, 38 Ohio St. 599; Dalton v. State, 43 Ohio St. 652.

<sup>3</sup>Dalton v. State, 43 Ohio St. 652.

ject and instructed the canvassers accordingly.<sup>1</sup> This is said to be the only case where this has ever been done.<sup>2</sup> Where a *mandamus* was asked to compel the canvass of over twenty-nine hundred votes cast in a county election, and the return was that the vote was fraudulent, and that there were only about eight hundred voters in the county, the court refused the writ, because it knew, as a matter of general notoriety, that the return was true.<sup>3</sup> Where it appeared on the undisputed facts that the relator was ineligible to the office for which by the writ of *mandamus* he sought a certificate of election, the petition was overruled. The court admitted that the returning board had no right to inquire into the eligibility of a candidate, but asserted that it would not aid in carrying out an unlawful proceeding, and that a relator must always show a good title.<sup>4</sup> This case is in harmony with the general rule, because the facts were undisputed.

**§ 181. A mandamus will issue to compel the proper officer to declare the result of the election.**—When it is the duty of an officer to declare the result of the election, he may be required to do so, and will not be allowed to confine himself to a declaration of the votes cast for each proposition.<sup>5</sup> Where, in case of a tie vote, the law requires the judge of the election to determine by lot which of the two candidates is elected, he will be required to perform such duty, even though the relator asked him not to do so, since the law fixes his duties.<sup>6</sup> When an appeal is taken from a canvassing board to an appellate canvassing board, whose members are equally divided on the question of affirming the action of the lower board, such a vote is an affirmance of the action of the lower board, and such appellate board may be required by a writ of *mandamus* to

<sup>1</sup> State v. Garesche, 65 Mo. 480.

<sup>5</sup> Steward v. Peyton, 77 Ga. 668;

<sup>2</sup> Dalton v. State, 43 Ohio St. 652. State v. Malcolm, 77 Ga. 671.

<sup>3</sup> Hall v. Stewart, 23 Kans. 396.

<sup>6</sup> Johnston v. State, 128 Ind. 16;

<sup>4</sup> People v. State Canvassers (Bd., 27 N. E. Rep. 422.  
N. Y., Dec. 29, 1891), 29 N. E. Rep.  
345.



issue the certificate required from them in case of the affirmance of the action of the lower board.<sup>1</sup>

**§ 182. Mandamus will issue to the canvassing board, though they have already given another the certificate.** The fact that a canvassing board has already declared the result and issued a certificate of election to another person is no adequate return to an alternative writ of *mandamus* to canvass the returns properly and to declare the proper result, when returns have been improperly counted or improperly rejected.<sup>2</sup> Such action does not oust the incumbent, and is often necessary to put the relator in a position to contest his rights.

**§ 183. The peremptory writ will specifically direct the canvassing board what to do.**—Before issuing the peremptory writ in such cases, the court will ascertain the specific duty of the canvassing board, and will order its performance,<sup>3</sup> will order them to count votes which they failed to count, and to reject votes which they ought not to have counted,<sup>4</sup> and to give the certificate to the person appearing on the face of the votes to be elected.<sup>5</sup> It is no objection to a *mandamus* to canvass the returns, that the office affected is that of a member of congress, since the duty of canvassing those votes is imposed on the canvassing board by the law of the state.<sup>6</sup>

**§ 184. Mandamus not lie when another remedy or the board had discretion or the election was illegal.**—A *man-*

<sup>1</sup> Elliott, Ex parte, 33 S. C. 602.

<sup>2</sup> State v. State Canvassers (Bd.), 17 Fla. 29; Brown v. Bd. Com'rs, 38 Kans. 436; Ellis v. Bristol Co. (Com'rs), 2 Gray, 370; People v. Rives, 27 Ill. 242; People v. Hilliard, 29 Ill. 413; Johnston v. State (Ind., April 8, 1891), 27 N. E. Rep. 422; Smith v. Lawrence (S. Dak., June 17, 1891), 49 N. W. Rep. 7. Even though the party commissioned has entered upon the discharge of the duties of the office (State v. Howe, 28 Neb. 618. *Contra*:

Oglesby v. Sigman, 58 Miss. 502; Magee v. Calaveras Co. (Sup'rs), 10 Cal. 376); because another had been commissioned (Myers v. Chalmers, 60 Miss. 772); because the certificate was given to one who was filling the office (State v. Rodman, 43 Mo. 254).

<sup>3</sup> State v. Williams, 95 Mo. 159.

<sup>4</sup> State v. Berg, 76 Mo. 136.

<sup>5</sup> Kisler v. Cameron, 39 Ind. 488.

<sup>6</sup> State v. Alachua Co. (Bd. Can.), 17 Fla. 9.

*damus* is allowed to canvassers of elections because it is considered that there is no other adequate remedy. A *quo warranto* was asserted not to be an adequate remedy, because such a defense in a *mandamus* proceeding obtains only when such remedy is attainable against the party against whom the *mandamus* is sought, and while the *mandamus* would run against the canvassing board, the *quo warranto* would be against the party declared to be elected.<sup>1</sup> Where a remedy considered adequate is provided by statute, as by contest or appeal, the writ will be refused.<sup>2</sup> When the election officers have a discretion in the matter, or are authorized to determine all contests and to decide on the qualifications of the parties, their action in the premises will not be reviewed by this writ.<sup>3</sup> A *mandamus* will not lie to canvass votes cast at an election for an office, which was then legally filled, and when no election therefor was proper;<sup>4</sup> nor when such election was held without authority of law.<sup>5</sup>

§ 185. By *mandamus* the canvassing board may be required to reconvene and do their duty, though they have adjourned *sine die*.— Though the board of canvassers have counted the votes, announced the result and adjourned *sine die*, they may be compelled by a *mandamus* to re-assemble and recount the votes, if it appears that upon the first canvass they made an erroneous count.<sup>6</sup> The board continues

<sup>1</sup> *People v. Greene Co. (Sup'rs)*, 12 Barb. 217.

<sup>2</sup> *State v. Stewart*, 26 Ohio St. 216; *State v. Smith*, 104 Mo. 661; *Mackey, Ex parte*, 15 S. C. 322; *State v. Berry*, 14 Ohio St. 315. A contest in Nebraska is not considered to be an adequate remedy. *State v. Stearns*, 11 Neb. 104.

<sup>3</sup> *Grier v. Shackleford*, 3 Brev. 491; *Vicksburg (Mayor) v. Rainwater*, 47 Miss. 547; *State v. Baton Rouge (Selectmen)*, 25 La. An. 310; *State v. Strong*, 32 La. An. 173;

*Scarborough, Ex parte* (S. C., Jan. 26, 1891), 12 S. E. Rep. 666.

<sup>4</sup> *Peters v. Board State Canvassers*, 17 Kans. 365.

<sup>5</sup> *State v. Whittemore*, 11 Neb. 175.

<sup>6</sup> *Lewis v. Marshall Co. (Com'rs)*, 16 Kans. 102; *State v. Berg*, 76 Mo. 136; *State v. Stearns*, 11 Neb. 104; *State v. Peacock*, 15 Neb. 442; *State v. Hill*, 20 Neb. 119; *State v. Gibbs*, 13 Fla. 55; *State v. Howe*, 28 Neb. 618; 44 N. W. Rep. 874; *Johnston v. State*, 128 Ind. 16; 27 N. E. Rep.

in existence till its whole duty is performed.<sup>1</sup> Where in a similar case the county board of supervisors were *ex officio* the board of canvassers, and it was objected that the canvassing board could not reconvene because the term of a member of the board of supervisors had expired and he had gone out of office, the court held that he continued to be a member of the canvassing board till it had discharged its duties, and that a *mandamus* would lie to compel him to act as a member thereof.<sup>2</sup> Where in such a case a rule to show cause or an alternative writ of *mandamus* is issued, it is proper that the court should issue an order inhibiting the board of canvassers from adjourning.<sup>3</sup> If, however, the board is allowed to be in session only a certain number of days, which have already passed, or if the board has been abolished by law, no writ of *mandamus* will issue to it, since the act called for is no longer a duty imposed upon the members thereof by law.<sup>4</sup> When, however, the duty can be discharged by their successors, the writ may be issued to such successors.<sup>5</sup>

422. *Contra*, *Oglesby v. Sigman*, 58 Miss. 502; *People v. Greene* (Com'rs), 12 Barb. 217.

<sup>1</sup> *People v. Schiellain*, 95 N. Y. 124; *State v. County Judge*, 7 Iowa, 186; *Simon v. Durham*, 10 Oreg. 52.

<sup>2</sup> *Smith v. Lawrence* (S. Dak., June 19, 1891), 49 N. W. Rep. 7.

<sup>3</sup> *Alderson v. Com'rs*, 31 W. Va. 633.

<sup>4</sup> *Mackey, Ex parte*, 15 S. C. 322; *State v. Gibbs*, 13 Fla. 55. Where a board was ordered to reconvene, one reason stated for such order was, that the board had finally adjourned before the law required them to do so, not having properly discharged their duties. *State v. Berg*, 76 Mo. 136.

<sup>5</sup> *Clark v. McKenzie*, 7 Bush, 523.

## CHAPTER 14.

### MANDAMUS TO COURTS.

- § 186. *Mandamus* lies to courts as to ministerial acts.
- 187. *Mandamus* does not lie to control the judicial discretion of a court.
- 188. Discretion of a court will be reviewed when it is guided by fraud, passion, prejudice or adverse interest.
- 189. *Mandamus* to courts to compel judicial action, but not to control it.
- 190. *Mandamus* lies to make a judge sign a bill of exceptions.
- 191. Application under the statute of Westminster to compel the signing of a bill of exceptions.
- 192. The bill of exceptions must be presented to the judge within the proper time.
- 193. No one can be required to sign a bill of exceptions except an officer.
- 194. Cases where a *mandamus* to sign a bill of exceptions will be refused.
- 195. *Mandamus* to restore attorneys who have been disbarred.
- 196. *Mandamus* not granted to review interlocutory proceedings of the courts.
- 197. Exceptions to the rule.
- 198. *Mandamus* often granted in Louisiana to review interlocutory orders.
- 199. Interlocutory orders of courts may in Alabama be reviewed by the writ of *mandamus*.
- 200. Interlocutory orders of courts may in Michigan be reviewed by writs of *mandamus*.
- 201. *Mandamus* cannot take the place of an appeal or writ of error.
- 202. *Mandamus* will not always lie, though appeal or writ of error not allowable.
- 203. *Mandamus* lies to compel a court to try a cause, when it refuses to do so on the erroneous decision that it has no jurisdiction.
- 204. When a court for any cause improperly refuses to proceed in a cause, *mandamus* lies to compel action.
- 205. Disputed question whether appeal or *mandamus* lies upon an erroneous dismissal of an appeal by the lower court.
- 206. When an appeal is wrongfully dismissed for matters occurring subsequent to its docketing, it may be reinstated on the docket by a *mandamus*.

- § 207. When a *mandamus* lies to compel a court to hear a cause, when it has declined to hear it by reason of an erroneous decision on some preliminary question.
208. *Mandamus* to compel the allowance of an appeal.
209. *Mandamus* will not lie to a court when there is another remedy.
210. Litigants cannot by agreement create duties which the court may be compelled by *mandamus* to perform.
211. Special instances where a *mandamus* was not required or would have been inefficacious.
212. *Mandamus* to justices of the peace.

§ 186. **Mandamus lies to courts as to ministerial acts.**—The writ of *mandamus* has been used most extensively to control and correct the action of inferior courts. It is used not only to restrain their excesses, but also to quicken their negligence and obviate their denial of justice.<sup>1</sup> When a duty is imposed by law upon a court, a *mandamus* from a higher court is the proper means to compel the discharge of such duty.<sup>2</sup> When such duty is so plain in point of law and so clear in matter of fact that no element of discretion is left as to the precise mode of its performance, such duty is ministerial, and a writ of *mandamus* to compel the performance of such duty will specify the exact mode of performance.<sup>3</sup>

§ 187. **Mandamus does not lie to control the judicial discretion of a court.**—As to all acts which are judicial in their nature, where the party or tribunal, at whose hands performance is sought, is required to decide questions of law or to ascertain matters of fact, the writ of *mandamus* will not issue, since it is never used to review or reverse judicial action;<sup>4</sup> nor to correct the errors of the court in the

<sup>1</sup> 3 Black. Com. 110; *State v. Kirke*, 12 Fla. 278; *Virginia v. Rives*, 100 U. S. 313.

<sup>2</sup> *Mason Co. (Bd. Sup'rs) v. Min-turn*, 4 W. Va. 300; *State v. Orphans' Ct. (Judge)*, 15 Ala. 740; *Manor v. McCall*, 5 Ga. 522.

<sup>3</sup> *State v. Williams*, 69 Ala. 311; *Mooney v. Edwards*, 51 N. J. L. 479.

<sup>4</sup> *Morgan, Ex parte*, 2 Chit. 250; *Oneida C. Pleas (Judges) v. People*, 18 Wend. 79; *Lewis v. Barclay*, 35 Cal. 213; *People v. Weston*, 28 Cal. 639; *Osborn v. Clark*, 1 Ariz. 397; *Mooney v. Edwards*, 51 N. J. L. 479; *Little v. Morris*, 10 Tex. 263; *Stout v. Hopping*, 17 N. J. L. 471; *Koon, Ex parte*, 1 Denio, 644; *State v.*

exercise of its judicial discretion;<sup>1</sup> nor to control the exercise of its discretion.<sup>2</sup> On the ground that the action of the court was a matter of judicial discretion, the writ of *mandamus* has been refused: to compel a judge or the court to extend the time wherein creditors may present their claims to the probate court;<sup>3</sup> to refer cases to a particular master in chancery;<sup>4</sup> to strike out a condition imposed on setting aside a *ca. sa.* for irregularity, that the defendant should stipulate not to bring an action for false imprisonment;<sup>5</sup> to rehear an appeal;<sup>6</sup> to allow an appeal from a justice of the peace upon a failure to appeal within the time limited by law;<sup>7</sup> to grant an injunction;<sup>8</sup> to punish for a contempt, since he must be the best judge whether a contempt was committed against the court;<sup>9</sup> to issue a writ of *habeas corpus*;<sup>10</sup> to issue a warrant to arrest a French officer, who had left his ship, as a deserter, under the convention with the United States;<sup>11</sup> to grant a warrant of restitution in a case of forcible entry and detainer;<sup>12</sup> to give a particular construction to an act of parliament;<sup>13</sup> to vacate an order staying proceedings on execution, when the property had already been levied on in another suit;<sup>14</sup> to receive certain

Orphans' Court (Judges), 15 Ala. 740; Milner, *Ex parte*, 6 Eng. L. & E. 371; Reg. v. Bristol (Just.), 28 Eng. L. & E. 160; Q. v. Middlesex (Just.), 2 Q. B. D. 516.

<sup>1</sup> Smyth v. Titcomb, 31 Me. 272; Shandies, *Ex parte*, 66 Ala. 134; Sankey v. Levy, 69 Cal. 244; State v. Powell, 10 Neb. 48; People v. Dutchess C. Pleas (Judges), 20 Wend. 658; Holloñ Parker, Petitioner, 131 U. S. 221; Dunklin Co. v. Dunklin Dist. Ct., 23 Mo. 449.

<sup>2</sup> Thornton v. Hoge, 84 Cal. 231; White v. Buskett, 119 Ind. 431; Hayes, *Ex parte*, 26 Ark. 510; McMillen v. Smith, 26 Ark. 613.

<sup>3</sup> People v. Monroe Co. (Probate Judge), 16 Mich. 204.

<sup>4</sup> People v. Williams, 55 Ill. 178.

<sup>5</sup> Gilbert v. Niagara Co. (Judge), 3 Cow. 59.

<sup>6</sup> Becke, *Ex parte*, 3 B. & Ad. 704.

<sup>7</sup> Vincent v. Bowes, 78 Mich. 315.

<sup>8</sup> Hayes, *Ex parte*, 26 Ark. 510;

McMillen v. Smith, 26 Ark. 613; State v. Judge Sixth Dist., 28 La. An. 905.

<sup>9</sup> Chamberlain, *Ex parte*, 4 Cow. 49. *Contra*, Ortman v. Dixon, 9 Cal. 23.

<sup>10</sup> People v. Russell, 46 Barb. 27; Opdyke, *Ex parte*, 62 Ala. 68.

<sup>11</sup> United States v. Lawrence, 3 Dal. 42.

<sup>12</sup> Q. v. Harland, 8 Ad. & E. 826.

<sup>13</sup> Sturgis v. Joy, 2 El. & Bl. 739.

<sup>14</sup> People v. New York Sup. Court 19 Wend. 701.

evidence, which had already been rejected in the trial of the cause;<sup>1</sup> to grant a particular judgment, to set aside a verdict, or to grant a new trial;<sup>2</sup> to conform in an equity case to the equity rules as to the time to appear and answer, where such conformity would work injustice;<sup>3</sup> to allow a motion to be permitted to intervene in a case;<sup>4</sup> to hear charges against a justice of the peace;<sup>5</sup> to issue an order for taking the testimony of a prisoner;<sup>6</sup> to vacate its rule setting aside an execution;<sup>7</sup> to correct his decision on the question of costs;<sup>8</sup> to accept the bond of a sheriff, when it had already declared the office to be vacant;<sup>9</sup> to hear an application for a *habeas corpus* when he had already heard the party on an application for bail;<sup>10</sup> to make him enter judgment on one of three verdicts, none of which covered all the points, and when the jury was finally discharged and a mistrial was entered;<sup>11</sup> to direct his judgment on an application for relief from, or alteration in, a tax assessment;<sup>12</sup> to receive defendant's plea;<sup>13</sup> to discharge an insolvent debtor who was out on bail, because his creditor failed to pay \$2 a week for his support;<sup>14</sup> to sign a judgment after a new trial had been granted;<sup>15</sup> to set aside a default and inquest thereon;<sup>16</sup> to allow double pleading;<sup>17</sup> to decide the amount of bail which is proper in the case;<sup>18</sup> to compel the allowance of a change of venue;<sup>19</sup> to proceed according

<sup>1</sup> King v. Cambridgeshire (Just.), 1 D. & R. 325.

<sup>2</sup> Squier v. Gale, 6 N. J. L. 157; People v. Wayne Cir. Court, 20 Mich. 220.

<sup>3</sup> Poultney v. La Fayette (City), 12 Pet. 472.

<sup>4</sup> People v. Sexton, 37 Cal. 532.

<sup>5</sup> Johnson, Ex parte, 3 Cow. 371.

<sup>6</sup> Willard v. Superior Court, 82 Cal. 456.

<sup>7</sup> Vanderveer v. Conover, 16 N. J. L. 271.

<sup>8</sup> State v. Kenosha Circuit (Judge), 3 Wis. 809.

<sup>9</sup> State v. Bowen, 6 Ala. 511.

<sup>10</sup> Campbell, Ex parte, 20 Ala. 89.

<sup>11</sup> Henry, Ex parte, 24 Ala. 638.

<sup>12</sup> Miltenberger v. St. Louis County Court, 50 Mo. 172.

<sup>13</sup> Anon., 7 N. J. L. 160.

<sup>14</sup> State v. Court Common Pleas, 38 N. J. L. 182.

<sup>15</sup> State v. Watts, 8 La. 76.

<sup>16</sup> Roberts, Ex parte, 6 Pet. 216.

<sup>17</sup> Davenport, Ex parte, 6 Pet. 661.

<sup>18</sup> Taylor, Ex parte, 14 How. 3.

<sup>19</sup> The writ is refused in such cases because the judicial discretion of the court is involved or because the matter can be corrected on appeal. People v. McRoberts, 100 Ill. 458;

to its first decision, which it altered during the same term of court;<sup>1</sup> to vacate an order opening a judgment and allowing the defendant to plead a discharge in bankruptcy;<sup>2</sup> to allow costs in a case of damages which it had refused to do;<sup>3</sup> to enter up a judgment on a verdict which was returned to the jury to further consider, who afterwards reported that they could not agree and were discharged;<sup>4</sup> to allow an appeal by a curator and to certify the case up without his giving a bond as ordered, because it did not appear that the adverse party had asked for a bond, when by law the court could require it,<sup>5</sup> to enter a decree upon a report of a referee;<sup>6</sup> to increase the tax for school purposes;<sup>7</sup> to reinstate a cause on the docket;<sup>8</sup> to review its action in dismissing proceedings for contempt after hearing the evidence;<sup>9</sup> to review any decision involving facts;<sup>10</sup> to punish parties for disobeying a subpoena *duces tecum*;<sup>11</sup> to grant a rehearing in an equity case;<sup>12</sup> to reverse its action in extending the time for pleading;<sup>13</sup> and to proceed in the trial of a cause, when it had been advised that an injunction had been issued commanding the parties to such cause to take no further proceedings therein.<sup>14</sup>

**§ 188. Discretion of a court will be reviewed when it is guided by fraud, passion, prejudice or adverse interest.** Though the rule is general that the action of the court, in

State v. Washburn, 22 Wis. 99; People v. Sexton, 24 Cal. 78. The writ has been granted in such cases, because the act of the court was considered to be ministerial (Coit v. Elliott, 28 Ark. 294; Kennedy v. Woolfolk, 1 Overt. 453), or an appeal would be too late. Danville v. Blackwell, 80 Va. 38.

<sup>1</sup> Foster v. Redfield, 50 Vt. 285.

<sup>2</sup> Elkins v. Athearn, 2 Denio. 191.

<sup>3</sup> Chase v. Blackstone C. Co., 10 Pick. 244.

<sup>4</sup> State v. Clementson, 69 Wis. 628.

<sup>5</sup> Potter v. Todd, 73 Mo. 101.

<sup>6</sup> Ludlum v. Fourth Dist. Ct., 9 Cal. 7.

<sup>7</sup> Union County Court v. Robinson, 27 Ark. 116.

<sup>8</sup> Hempstead County v. Grave, 44 Ark. 317.

<sup>9</sup> Heilbron v. Superior Court, 72 Cal. 96; State v. Horner, 16 Mo. Ap. 191.

<sup>10</sup> Oneida C. Pleas (Judges) v. People, 18 Wend. 79.

<sup>11</sup> Burtis, Ex parte, 103 U. S. 238.

<sup>12</sup> Gresham, Ex parte, 82 Ala. 359.

<sup>13</sup> Opdyke, Ex parte, 62 Ala. 68.

<sup>14</sup> State v. Orphans' Court (Judge), 15 Ala. 740; People v. Muskegon Cir. Judge, 40 Mich. 63; People v. Gilmer, 10 Ill. 242.



a matter calling for the exercise of its judgment or discretion, will not be reviewed or corrected by this writ, yet the courts will not adhere thereto when it is apparent that the action of the court proceeds from fraud, passion, prejudice or adverse interest; but such facts must be very clearly proved before a court will interfere by this writ.<sup>1</sup>

§ 189. **Mandamus to courts to compel judicial action, but not to control it.**—Judges and courts, like all other officers and tribunals, may be compelled by the writ of *mandamus* to perform any ministerial act upon refusal so to do. So when any duty devolves upon them which calls for judgment and discretion, they cannot ignore it, but may be compelled by this writ to take cognizance thereof and come to some conclusion thereon, but the writ will in no manner direct the form or nature of such conclusion. The writ has been considered to be proper: to make a court hold a term of court;<sup>2</sup> to compel the appointment of a guardian to defend an adult *non compos* who has been sued;<sup>3</sup> to reverse the action of the court in refusing to allow a sheriff to amend his return, pending an action against him for judgment thereon, which is collateral to the suit wherein his return was made;<sup>4</sup> to compel the granting of letters of administration to A., the refusal so to do not being either an interlocutory or a final judgment;<sup>5</sup> to receive<sup>6</sup> and enter<sup>7</sup> the verdict of the jury; to enter a judgment on the verdict, when the court cannot on its own motion,<sup>8</sup> or otherwise,<sup>9</sup> set it aside and grant a new trial; to enter judgment on an alternative verdict according to the election of the

<sup>1</sup> Union Colony v. Elliott, 5 Colo. 371; Schlaudecker v. Marshall, 72 Pa. St. 200; Vincent v. Bowes, 78 Mich. 315; Knarr's Petition, 127 Pa. St. 554; State v. Kirke, 12 Fla. 278; Virginia v. Rives, 100 U. S. 313; Manor v. McCall, 5 Ga. 522. See *ante*, §§ 40, 41, where the question is fully considered.

<sup>2</sup> Trapnall, *Ex parte*, 6 Ark. 9.

<sup>3</sup> Northington, *Ex parte*, 37 Ala. 496.

<sup>4</sup> Casky v. Haviland, 13 Ala. 314.

<sup>5</sup> Brennan v. Harris, 20 Ala. 185.

<sup>6</sup> Com. v. Norfolk (Sessions), 5 Mass. 434; State v. Knight, 46 Mo. 83; Com. v. Middlesex (Sessions), 9 Mass. 388.

<sup>7</sup> Munkers v. Watson, 9 Kans. 668.

<sup>8</sup> Lloyd v. Brinck, 35 Tex. 1.

<sup>9</sup> State v. Adams, 76 Mo. 605; Lloyd v. Brinck, 35 Tex. 1; Cortleyou v. Ten Eyck, 22 N. J. L. 45; Brooke v. Ewers, 1 Stra. 113; Peo-

plaintiff;<sup>1</sup> to enter judgment in a criminal case and pass sentence accordingly;<sup>2</sup> to compel the court to make an entry on its minutes of its refusal to admit to probate the certified will of a non-resident, and to grant letters testamentary to the executor;<sup>3</sup> to enter judgment on the report of a referee assessing damages on the dissolution of an injunction;<sup>4</sup> to compel the judge to sign the judgment;<sup>5</sup> to execute his sentence<sup>6</sup> and to carry his decree into effect, when the appeal bond given was not sufficient to entitle the appellant to a *supersedeas*, though the court granted it;<sup>7</sup> to compel a court to amend its records in accordance with the facts,<sup>8</sup> which may be corrected though the case is appealed, prior to final judgment in the appellate court;<sup>9</sup> to correct a judgment erroneously entered upon reasonable application, when the rights of third parties are not injured;<sup>10</sup> to enter up an award as the judgment of the court;<sup>11</sup> to compel a chancellor to make an order requiring the restitution of money paid under a decree, which has been reversed on appeal;<sup>12</sup> to compel a court to reinstate on its

ple v. Chenango (Just.), 1 John. Cas. 179.

<sup>1</sup> State v. Mills, 27 Wis. 403.

<sup>2</sup> State v. Snyder, 98 Mo. 555.

<sup>3</sup> Williams v. Saunders, 5 Cold. 60.

<sup>4</sup> Russell v. Elliott, 2 Cal. 245.

<sup>5</sup> Life, etc. Co. v. Wilson, 8 Pet. 291; State v. Judge Fourth Dist. Ct., 28 La. An. 451.

<sup>6</sup> United States v. Peters, 5 Cranch, 115; State v. Whittet, 61 Wis. 351.

<sup>7</sup> Stafford v. Union Bank La., 17 How. 275.

<sup>8</sup> Hendee v. Cleveland, 54 Vt. 142; Taylor v. Gillette, 53 Conn. 216; State v. Whittet, 61 Wis. 351; Hollister v. Lucas Dist. Ct. (Judges), 8 Ohio St. 201; Howell v. Crutchfield, Hemp. 99; Frederick v. Mecosta Cir. Judge, 52 Mich. 529. This proposition is denied (White v. Burkett,

119 Ind. 431), and will, it is claimed, produce anarchy in legal proceedings. Dixon v. Judge 2d Jud. Dist., 4 Mo. 286. The proper remedy is considered to be an application to the court itself, which will make the proper correction. King v. Hewes, 3 Ad. & E. 725; 5 N. & M. 139; King v. Leicestershire (Just.), 1 M. & S. 442. When the court has considered and overruled a motion to amend the judgment to conform to the complaint, its action is judicial and the remedy must be sought by appeal or writ of error. Morgan, Ex parte, 114 U. S. 174.

<sup>9</sup> Henderson, Ex parte, 84 Ala. 36.

<sup>10</sup> Frederick v. Circuit Judge, 52 Mich. 529.

<sup>11</sup> Dudley, Ex parte, 79 Ala. 187.

<sup>12</sup> Walter Brothers, Ex parte, 89 Ala. 237.

docket a cause dismissed for not stating in the pleadings the amount involved in the suit so as to show the jurisdiction of the court, when by the practice of the court such amount might be shown by other means;<sup>1</sup> to compel county courts to put in their records in election cases their rulings, and sufficient of the evidence to explain them, in order that the circuit courts may properly review them in the *certiorari* proceedings prescribed by law;<sup>2</sup> to compel the lower court to obey the mandate of the supreme court, which it disobeys, misconstrues or does not heed, and to enter the proper decree and to carry it into execution;<sup>3</sup> to compel a court to make the necessary orders in a criminal case to enable the depositions of witnesses for the defendant, residing out of the state, to be taken;<sup>4</sup> to compel a court to issue a writ of *habeas corpus*;<sup>5</sup> to require a court to qualify a deputy-sheriff;<sup>6</sup> to compel a court to appoint commissioners to condemn land for, and assess the damages in the construction of, a railroad;<sup>7</sup> to compel a court, as requested, to appoint a surveyor to vacate a public road;<sup>8</sup> to compel a court to administer the oath of insolvency to a debtor and then to discharge him, though the court may believe he fraudulently conceals some of his assets;<sup>9</sup> to compel a register to call a register's court, when in probating a will a difficult or disputable matter comes into controversy;<sup>10</sup> to enable the plaintiff, when refused permission by the court, to substitute another attorney for the one employed by B., to

<sup>1</sup> Bradstreet, Ex parte, 7 Pet. 634.

<sup>2</sup> Dryden v. Swinburne, 20 W. Va. 89.

<sup>3</sup> Johnson v. Glascock, 2 Ala. 519; United States v. Fossatt, 21 How. 445; State v. Collins, 5 Wis. 339; Duffitt v. Crozier, 30 Kans. 150; Jared v. Hill, 1 Blackf. 155; Dubuque, etc., R. R. Ex parte, 1 Wall. 69.

<sup>4</sup> Giboney v. Rogers, 32 Ark. 462.

<sup>5</sup> Wright v. Johnson, 5 Ark. 687.

<sup>6</sup> Day v. Fleming County Court (Just.), 3 B. Mon. 198; Applegate v. Applegate, 4 Metc. (Ky.) 236.

<sup>7</sup> Illinois C. R. R. v. Rucker, 14 Ill. 353; Chicago, etc. R. R. v. Wilson, 17 Ill. 123.

<sup>8</sup> State v. Salem Pleas (Judges), 9 N. J. L. 246.

<sup>9</sup> Harrison v. Emmerson, 2 Leigh, 764.

<sup>10</sup> Com. v. Bunn, 71 Pa. St. 405.

whom the plaintiff had conveyed a part interest in the claim in dispute with an agreement that B. should prosecute it;<sup>1</sup> to compel the grant of administration on an estate to the person entitled to it;<sup>2</sup> to obtain the release of one arrested on civil process immediately upon release from a similar arrest without having given him time to return home;<sup>3</sup> to compel a judge to certify a cause in which he is interested as an attorney to the proper court;<sup>4</sup> and to compel the trial court to fix the amount of the bond necessary to stay proceedings in a cause pending an appeal thereof to an appellate court.<sup>5</sup>

**§ 190. Mandamus lies to make a judge sign a bill of exceptions.**—A writ of *mandamus* lies to compel a judge to sign a bill of exceptions. Unless the bill of exceptions is signed, the appellant is unable to enjoy the benefits of the right of appeal, and the appellate jurisdiction of the higher courts cannot be exercised. The right to issue a *mandamus* for that purpose is well established.<sup>6</sup> The signing and sealing of a bill of exceptions is both ministerial and judicial. The determination of what the bill shall contain is judicial,<sup>7</sup> consequently a *mandamus* to sign a bill of exceptions will only issue when there is a clear abuse of discretion.<sup>8</sup> The writ will not direct the judge how to frame the bill of exceptions;<sup>9</sup> it will run in the alternative

<sup>1</sup> *People v. Norton*, 16 Cal. 436.

<sup>2</sup> *Steward v. Eddy*, 7 Mod. 143.

<sup>3</sup> *People v. Detroit* (Superior Judge), 40 Mich. 729.

<sup>4</sup> *Graham v. People*, 111 Ill. 253.

<sup>5</sup> *State v. Sachs* (Wash., Nov. 12, 1891), 27 Pac. Rep. 1075.

<sup>6</sup> *Herteman*, In re, 73 Cal. 545; *State v. Macdonald*, 30 Minn. 98; *Ah Lep v. Gong Choy*, 13 Oreg. 205; *State v. Baxter*, 38 Minn. 137; *State v. Barnes*, 16 Neb. 37; *Reichenbach v. Ruddach*, 121 Pa. St. 18; *Powell v. Tarry*, 77 Va. 250; *State v. Whittet*, 61 Wis. 351; *Crane*, Ex

parte, 5 Pet. 190; *Sansome v. Myers*, 80 Cal. 483; *Chateaugay, etc. Co., Petitioner*, 128 U. S. 544; *People v. Crane*, 60 Cal. 279; *State v. Field*, 37 Mo. Ap. 83; *State v. Drew*, 32 La. An. 1043; *Briscoe v. Ward*, 1 Har. & J. 165; *People v. Washington C. Pleas* (Judges), 2 Caines, 97; *Etheridge v. Hall*, 7 Port. 47.

<sup>7</sup> *People v. Anthony*, 129 Ill. 218; *Clark v. Crane*, 57 Cal. 629.

<sup>8</sup> *Alexander v. State*, 82 Tenn. 88; *State v. Brockwell*, 84 Tenn. 683.

<sup>9</sup> *Chateaugay, etc. Co., Petitioner*, 128 U. S. 544.

form, *quod si ita est*, and if the return is *quod non ita est*,<sup>1</sup> it is sufficient. The judge is to decide as to the propriety, accuracy and truth of the bill; he will not be required to sign one which he does not believe to be correct.<sup>2</sup> His decision as to its truthfulness is conclusive and final, and the court will hear no testimony thereon.<sup>3</sup> When the judge returns that he has already settled and signed a bill of exceptions according to his knowledge and recollection of the facts, such return is sufficient, and the matter is not to be determined by an issue submitted to a jury.<sup>4</sup> If the judge returns that he considers the bill incorrect, or shows any other sufficient objection to it,<sup>5</sup> as that it is illegible, disorderly, erased or interlined,<sup>6</sup> the peremptory writ will be refused. When, however, the judge in his return admits the bill of exceptions to be correct,<sup>7</sup> or has heard the motion for a new trial on a statement of the case stipulated by the parties to be correct,<sup>8</sup> his duty to sign the bill of exceptions becomes merely ministerial, and a *mandamus* will issue to compel him to sign it. When the judge returns to the alternative writ, that he has settled and signed a bill of exceptions, the writ has accomplished its purpose and is *functus officio*.<sup>9</sup> The petition for a writ of *mandamus* should be accompanied by the bill of exceptions,<sup>10</sup> though it

<sup>1</sup> *Benedict v. Howell*, 39 N. J. L. 221.

<sup>2</sup> *People v. Williams*, 91 Ill. 87; *People v. Jameson*, 40 Ill. 93; *Bradstreet, Ex parte*, 4 Pet. 102; *State v. Todd*, 4 Ohio, 351.

<sup>3</sup> *Shepard v. Peyton*, 12 Kans. 616; *Benedict v. Howell*, 39 N. J. L. 221; *Sikes v. Ransom*, 6 John. 279; *State v. Todd*, 4 Ohio St. 351; *Creager v. Meeker*, 22 Ohio St. 207; *State v. Small*, 47 Wis. 436; *State v. Sheldon*, 2 Kans. 322; *State v. Babcock*, 51 Vt. 570; *Cummings v. Armstrong*, 34 W. Va. 1.

<sup>4</sup> *State v. Noggle*, 13 Wis. 380;

*People v. Jamison*, 40 Ill. 93; *People v. Anthony*, 139 Ill. 218; *Cummings v. Armstrong*, 34 W. Va. 1.

<sup>5</sup> *People v. Pearson*, 2 Scam. 189; *Etheridge v. Hall*, 7 Port. 47; *State v. Hawes*, 43 Ohio St. 16; *Bradstreet, Ex parte*, 4 Pet. 102.

<sup>6</sup> *Cottle v. Harrold*, 72 Ga. 830; *Pretorius v. Barnes*, 75 Ga. 313.

<sup>7</sup> *Conrow v. Schloss*, 55 Pa. St. 28.

<sup>8</sup> *State v. Cox*, 26 Minn. 214.

<sup>9</sup> *Thornton v. Hoge*, 84 Cal. 231; *People v. Wayne Cir. Judge*, 32 Mich. 259.

<sup>10</sup> *Creager v. Meeker*, 22 Ohio St. 207; *Sikes v. Ransom*, 6 John. 279;

is not necessary to recite the bill in the petition,<sup>1</sup> or the court may not be able to determine whether it will tend to manifest any error committed on the trial, and may for that reason refuse the writ.<sup>2</sup> The bill of exceptions presented to the judge must in good faith profess to contain all the evidence. The court cannot be required to draft a lengthy bill of exceptions, or to perform clerical work of moment, either directly or indirectly.<sup>3</sup> The court cannot say the bill is wrong, fold its hands and do nothing; but, when a bill is prepared that is claimed to embrace the whole proceedings, it is its duty to carefully examine it and correct it if need be, so as to make it speak the absolute truth.<sup>4</sup> If the court refuses to incorporate in a bill of exceptions an affidavit which it ordered stricken from the files, a *mandamus* may be obtained to compel such insertion, provided the affidavit is not objectionable.<sup>5</sup> The person who offers a bill of exceptions ought to present such an one as the judge can sign. The course to be pursued is, either to endeavor to draw up a bill by agreement which the judge can sign, or to prepare a bill to which there can be no objection, and present it to the judge.<sup>6</sup> At best a litigant's efforts to present his case properly before an appellate court are largely dependent upon the trial judge, since the bill of exceptions is moulded on the recollections of the latter. Such provision for determining what evidence was presented at the trial seems unavoidable, since the right to finally decide must be lodged somewhere. At present the general use of stenographers reduces the liability of error to a minimum.

People v. Jamison, 40 Ill. 93; Page v. Clopton, 30 Grat. 415; Conrow v. Schloss, 55 Pa. St. 28.

<sup>1</sup> People v. Westchester Ct. C. Pleas, 4 Cow. 73.

<sup>2</sup> People v. Dickson, 46 Cal. 53.

<sup>3</sup> Sansome v. Myres, 77 Cal. 353; Swartz v. Nash, 45 Kans. 341.

<sup>4</sup> Swartz v. Nash, *supra*; Vabrye v. Staton, 88 Tenn. 334.

<sup>5</sup> Van Etten v. Butt (Neb., June 30, 1891), 49 N. W. Rep. 365.

<sup>6</sup> Bradstreet, Ex parte, 4 Pet. 102; People v. Jamison, 40 Ill. 93; Page v. Clopton, 30 Grat. 415.

§ 191. **Application under the statute of Westminster to compel the signing of a bill of exceptions.**— When the application for an order to compel the judge to sign a bill of exceptions is framed under the statute of Westminster 2d (13 Edward 1, ch. 31), the judge is required to confess and seal the exceptions or to deny them. If he confess and seal them, they become part of the record; if he deny them, the petitioner has his action at law for a false return. This proceeding, however, is special and is not a *mandamus*, and seems to be used in only one state, where it was adopted by statute.<sup>1</sup>

§ 192. **The bill of exceptions must be presented to the judge within the proper time.**— A court will not be required to sign a bill of exceptions, unless it be presented within the proper time. It must be presented to the judge for signature within the time allowed by law, which is generally during the term in which the case is tried;<sup>2</sup> but the court may extend the time by an order which must be entered of record.<sup>3</sup> After such period the court will not be required to sign the bill.<sup>4</sup> Among other reasons why the delay is not admissible is the fact that the judge may forget the evidence.<sup>5</sup> When the judge is required to decide whether such delay is excusable, his decision in such matter is judicial, and a *mandamus* will not lie to make him sign the bill, since such action would control his judicial discretion as to whether the delay in presenting the bill was excusable.<sup>6</sup> It is no objection that the application for a *mandamus* to compel the judge to sign the bill is made after the period limited by law for such signing has passed, if the applicant has performed his duty in due season, and the delay is due to the fault or absence of the judge, or the

<sup>1</sup> Conrow v. Schloss, 55 Pa. St. 28; Haines v. Com., 99 Pa. St. 410.

<sup>2</sup> Medberry v. Collins, 9 Johns. 345; Sheppard v. Wilson, 6 How. 260.

<sup>3</sup> State v. St. Louis C. Court (Judge), 41 Mo. 598.

<sup>4</sup> Alexander v. State, 14 Lea, 88.

<sup>5</sup> Sikes v. Ransom, 6 John. 279.

<sup>6</sup> Sprague v. Fawcett, 53 Cal. 408; Stonesifer v. Armstrong, 86 Cal. 594.

fault of the opposing party.<sup>1</sup> The court will not be required to settle a bill of exceptions on a motion for a new trial, when the motion itself was made after the time limited therefor, since the court will not order a vain thing.<sup>2</sup>

§ 193. No one can be required to sign a bill of exceptions except an officer.— Since a *mandamus* never issues against a private party, it will not compel a person to sign a bill of exceptions, who by consent of the parties acted as judge on the trial of the cause,<sup>3</sup> nor to the trial judge, who has since resigned, or whose term of office has since expired.<sup>4</sup>

§ 194. Cases where a *mandamus* to sign a bill of exceptions will be refused.— It is a matter of course that a judge cannot be called upon to sign a bill of exceptions in a case tried by his predecessor, since he can know nothing about it;<sup>5</sup> but it is said that he should be applied to for that purpose, as he would no doubt grant a new trial if satisfied that justice requires it.<sup>6</sup> It would seem that justice would require a new trial in all such cases, else the litigant would be deprived of rights accorded to others. It has been held that a judge has no power over a bill of exceptions after he has signed it and it has been filed, and that any alterations made in it thereafter by him are made in his private capacity, and, therefore, a *mandamus* will not lie to compel him to restore it to its former condition.<sup>7</sup> A judge

<sup>1</sup> *Etheridge v. Hall*, 7 Port. 47; *People v. Lee*, 14 Cal. 510; *Trinity, &c. R. R. v. Lane*, 79 Tex. 643; *People v. Van Buren C. (Judge)*, 41 Mich. 725.

<sup>2</sup> *Clark v. Crane*, 57 Cal. 629.

<sup>3</sup> *State v. Larrabee*, 3 Wis. 783.

<sup>4</sup> *De Haas v. Newaygo Cir. Judge*, 46 Mich. 12; *State v. Pearson*, 3 Scam. 270. A custom sprang up in Wisconsin for the trial judge to sign the bill of exceptions, though his term of office had expired, and the custom was considered to be unobjectionable. *Davis v. Menasha*

(*Village*), 20 Wis. 194; *Hale v. Haselton*, 21 Wis. 320. In Nebraska a *mandamus* has been granted against an ex-judge to compel him to sign a bill of exceptions because otherwise there was no remedy. *State v. Barnes*, 16 Neb. 37. The same object was accomplished in Pennsylvania by a *certiorari*. *Galbraith v. Green*, 13 S. & R. 85.

<sup>5</sup> *Fellows v. Tait*, 14 Wis. 156.

<sup>6</sup> *De Haas v. Newaygo Cir. Judge*, 46 Mich. 12.

<sup>7</sup> *State v. Powers*, 14 Ga. 388.



will not be required to sign a bill of exceptions in a criminal case, when the prisoner has escaped after conviction. The courts will not encourage escapes and facilitate the evasion of the justice of the state by extending to escaped convicts the means of reviewing their convictions.<sup>1</sup> The fact that there is another remedy bars the use of a *mandamus*. A *mandamus* will be refused to compel a judge to sign a bill of exceptions, when the law says by-standers may sign it,<sup>2</sup> till such statutory remedy be pursued or shown to be unavailable.<sup>3</sup>

§ 195. **Mandamus to restore attorneys who have been disbarred.**—The remedy by *mandamus* has been applied from an early day to correct the abuses of inferior courts in summary proceedings against their officers, and especially against the attorneys and counselors of the courts. The order disbarring attorneys, or subjecting them to fine or imprisonment, is not reviewable by writ of error, it not being a judgment in the sense of the law for which such writ will lie. Without, therefore, the use of the writ of *mandamus*, however flagrant the wrong committed against these officers, they would be destitute of any redress. Where the act complained of rested in the exercise of the court's discretion, the remedy by *mandamus* has failed. But such discretion is not unlimited; for if it be exercised with manifest injustice, the court of king's bench will command its due exercise. It must be a sound discretion and according to law. This proceeding by *mandamus*, to redress the injury which an attorney has sustained by a disbarment, fine or imprisonment, is admitted to be the recognized remedy when the case is outside of the exercise of the court's discretion, and is one of irregularity, or against law, or of flagrant injustice, or without jurisdiction.<sup>4</sup> The reasons given for issuing the writ in such cases are, that the office of an attorney is of public concern and regards the

<sup>1</sup> *People v. Genet*, 59 N. Y. 80.

<sup>3</sup> *State v. Tayer*, 15 Mo. Ap. 391.

<sup>2</sup> *Jamison v. Reed*, 2 G. Greene, 394; *State v. Wickham*, 65 Mo. 634.

<sup>4</sup> *Bradley, Ex parte*, 7 Wall. 364.

administration of justice, and that there is no other remedy.<sup>1</sup> A *mandamus* is a proper remedy to restore an attorney who has been disbarred,<sup>2</sup> when the court exceeded its jurisdiction,<sup>3</sup> or acted improperly, or the charge was founded in error or mistake,<sup>4</sup> or when the disbarment is a nullity,<sup>5</sup> or the cause of disbarment was a contempt alleged to have been committed before another court,<sup>6</sup> or the court has decided erroneously on the testimony and it is a plain case of wrong and injustice,<sup>7</sup> or the judgment is too severe, the offense being rather a mistake than an intentional error.<sup>8</sup> In some cases the courts have declined to interfere because the questions involved were of judicial discretion, and because the courts are not inclined to interfere in any case unless the conduct of the lower court was irregular or flagrantly improper.<sup>9</sup> So where the law allows one possessing the necessary qualifications to apply to be examined as to his qualifications for practicing law, a *mandamus* will lie to secure to him such an examination, and the necessary certificate if he is found to be qualified.<sup>10</sup> Where, however, the admission of an attorney is a judicial act, a *mandamus* will not lie to compel a court to admit a party to be an attorney.<sup>11</sup>

**§ 196. Mandamus not granted to review interlocutory proceedings of the courts.**—A *mandamus* will not be

<sup>1</sup> White's Case, 6 Mod. 18; Hurst's Case, 1 Lev. 75; People v. Delaware C. Pleas (Just.), 1 Johns. Cas. 181.

<sup>2</sup> Withers v. State, 36 Ala. 252.

<sup>3</sup> Robinson, Ex parte, 19 Wall. 505; State v. Sachs (Wash., May 21, 1891), 26 Pac. Rep. 865.

<sup>4</sup> Gephard, In re, 1 Johns. Cas. 134.

<sup>5</sup> Walls v. Palmer, 64 Ind. 493.

<sup>6</sup> Bradley, Ex parte, 7 Wall. 364.

<sup>7</sup> State v. Kirke, 12 Fla. 278.

<sup>8</sup> People v. Delaware C. Pleas (Just.), 1 Johns. Cas. 181.

<sup>9</sup> Burr, Ex parte, 9 Wheat. 529; Bradley, Ex parte, 7 Wall. 364.

<sup>10</sup> State v. Baker, 25 Fla. 598. It did not lie to the inns of court, since they were but voluntary associations, and possessed no powers save what the judges delegated to them. The remedy was to apply to the judges. King v. Gray's Inn (Benches), Doug. 353.

<sup>11</sup> Com. v. Cumberland C. Pleas (Judges), 1 S. & R. 187; Com. v. District Court (Judges), 5 Watts & S. 272.

granted to review interlocutory proceedings, or orders of a court made in a cause pending before it prior to the final determination thereof,<sup>1</sup> even though the action of the court bears harshly and oppressively on the relator.<sup>2</sup> The remedy is by appeal or writ of error after final judgment. Apart from the question of interfering by *mandamus* in questions involving the judgment and discretion of courts, it has been considered that such interference would make legal controversies interminable;<sup>3</sup> would involve great expense, and would overwhelm the superior courts to the great delay of justice,<sup>4</sup> while the same questions would come up again on an appeal from the final judgment or decree. This writ has been refused: to compel a trial judge to prevent the filing of a pleading, though it was claimed that in no other way could the relator assert an alleged constitutional right;<sup>5</sup> to allow a person to be admitted as a party to foreclosure proceedings;<sup>6</sup> to vacate an order setting aside a nonsuit;<sup>7</sup> to compel a court to obey the orders prescribed for equitable proceedings;<sup>8</sup> to allow a plaintiff to dismiss the cause at his costs;<sup>9</sup> to compel a court to set aside an injunction;<sup>10</sup> to make a court reverse its ruling on the admissibility of certain evidence, though such court was the highest appellate court for such case;<sup>11</sup> to compel a change of venue;<sup>12</sup> or to allow an appeal from an interlocutory order, such as the allowance of alimony and counsel fees in a divorce suit subsequent to the granting of the

<sup>1</sup> *Perry, Ex parte*, 102 U. S. 183; *ple*, 18 Wend. 79; *State v. Engelman*, 86 Mo. 551.

*Sawyer, Ex parte*, 88 U. S. 235; <sup>5</sup> *State v. Thayer*, 10 Mo. Ap. 540.

*Life, etc. Ins. Co. v. Adams*, 9 Pet. 571; *Hoyt, Ex parte*, 13 Pet. 279; <sup>6</sup> *Moon v. Wellford*, 84 Va. 34.

*Flippen, Ex parte*, 94 U. S. 348; <sup>7</sup> *Loring, Ex parte*, 94 U. S. 418.

*State v. Williams*, 69 Ala. 311. <sup>8</sup> *Myra Clarke Whitney, Ex parte*, 13 Pet. 404.

<sup>2</sup> *Myra Clarke Whitney, Ex parte*, 13 Pet. 404. <sup>9</sup> *People v. Pratt*, 28 Cal. 166.

<sup>3</sup> *People v. Dutchess C. Pleas*, 20 Wend. 658. <sup>10</sup> *Schwab, Ex parte*, 98 U. S. 240.

<sup>4</sup> *Judges Oneida C. Pleas v. Peo-* <sup>11</sup> *Scott v. Superior Court*, 75 Cal. 114.

*240.* <sup>12</sup> *Chambers, Ex parte*, 10 Mo. Ap. 240.

divorce, but while the division of the property and the custody of the offspring were reserved for further action by the court.<sup>1</sup>

§ 197. **Exceptions to the rule.**—The rule, that a *mandamus* will not lie to review or correct the interlocutory orders or decisions of a court, is not of universal acceptance. In New York it has been allowed: to vacate an order setting aside a report of referees;<sup>2</sup> to correct erroneous practice;<sup>3</sup> to vacate a rule allowing an amendment by permitting the declaration to be filed there, and requiring the defendant to plead in that court, whereas the declaration and the rule to plead had been entered in another court,<sup>4</sup> and to vacate a rule for a new trial.<sup>5</sup> But this position is now abandoned, and the New York courts will no longer issue this writ to review the interlocutory proceedings of courts.<sup>6</sup> A *mandamus* has been issued in Arkansas to compel the allowance of an injunction.<sup>7</sup>

§ 198. **Mandamus often granted in Louisiana to review interlocutory orders.**—Under the law of Louisiana litigants may appeal from all interlocutory judgments, when such judgments may cause irreparable injury;<sup>8</sup> in other cases the courts will not interfere with such judgments.<sup>9</sup> Accordingly a *mandamus* was refused to compel the allowance of an appeal from an interlocutory order in a suit for a dissolution of a partnership, directing a sale of the partnership property, because such sale would not cause irreparable injury.<sup>10</sup> Where a case was still pending and undisposed of, a *mandamus* was held to be proper to allow

<sup>1</sup> Lake v. King, 16 Nev. 215.

<sup>2</sup> People v. Niagara C. Pleas, 12 Wend. 246.

<sup>3</sup> Blunt v. Greenwood, 1 Cowen, 15.

<sup>4</sup> People v. Superior Court N. Y., 18 Wend. 675.

<sup>5</sup> Craykendoll, Ex parte, 6 Cow. 53.

<sup>6</sup> People v. Dutchess C. Pleas (Judges), 20 Wend. 658; Oneida C.

Pleas (Judges) v. People, 18 Wend. 79; People v. Oneida C. Pleas (Judges), 21 Wend. 20.

<sup>7</sup> Pile, Ex parte, 9 Ark. 336.

<sup>8</sup> State v. Judge Fourth Dist. Court, 21 La. An. 736; State v. Judge Third Dist. Court, 31 La. An. 800.

<sup>9</sup> State v. Judge, 15 La. 521.

<sup>10</sup> State v. Judge Third Dist. Court, 6 La. An. 484.

an appeal from the order of the court, carrying into effect a prior judgment in the case, which was confirmed on appeal, when such order was more extensive than the appellate judgment.<sup>1</sup> A *mandamus* was issued to allow a suspensive appeal from an order dissolving an injunction;<sup>2</sup> but it was considered to be necessary that the continuation of the acts enjoined would cause irreparable injury.<sup>3</sup> At one time the courts in Louisiana refused to review or correct by *mandamus* any interlocutory judgment or decree;<sup>4</sup> but under the provisions of a later state constitution the courts claimed the right to compel an inferior court by *mandamus* to issue an injunction in a case clearly sufficient on the facts, when no question of law was involved. At the same time the courts disclaimed any intention of interfering with the independence of the courts or of overruling their discretion, save in a clear case of usurpation of authority or abuse of discretion, but reserved the right to make exceptions to such disclaimer if they considered public interests demanded it.<sup>5</sup> Under the wording of the Louisiana law, a *mandamus* may issue to prevent a failure of justice, and the supreme court has considered that therefore it should issue in all cases where the law has assigned no relief by the ordinary means, and when justice and reason require that some mode shall exist for redressing a wrong or an abuse of any nature whatever.<sup>6</sup> Even if the party has other means of relief, the court will issue the writ of *mandamus* in his behalf, if the slowness of ordinary legal forms is likely to produce such immediate injury or mischief as ought to be prevented.<sup>7</sup> Accordingly this writ has been used to compel the lower court to issue an injunction *in limine* which it had already refused to do; but to obtain a *mandamus* in such a case, it must appear that the party

<sup>1</sup> State v. West Baton Rouge (Judge Prob.), 8 Rob. 193.

<sup>2</sup> State v. Judge Fourth Dist. Court, 21 La. An. 736.

<sup>3</sup> State v. Monroe, 41 La. An. 241.

<sup>4</sup> State v. Judge Sixth Dist., 28

La. An. 905; State v. Parish Judge of St. Bernard, 31 La. An. 794.

<sup>5</sup> State v. Judge Sixth Dist. Court, 32 La. An. 549.

<sup>6</sup> State v. Young, 38 La. An. 923.

<sup>7</sup> State v. Lazarus, 36 La. An. 578.

is entitled as of right to the injunction, the facts must be clearly sufficient, and no question of law must be involved.<sup>1</sup> In other decisions it is said that a *mandamus* will not lie to compel a judge to grant an injunction which he has already refused, unless it is a cause where under the code of practice he has no discretion;<sup>2</sup> if he has such discretion his decision can only be reviewed on appeal.<sup>3</sup> Where a court erroneously refused to try a case himself and referred it to a jury, a *mandamus* was issued to make him try the case himself.<sup>4</sup> The constitution of Louisiana has been changed several times, and the varying rulings of their courts are due to such changes. At present the supreme court of that state claims great latitude in reviewing the actions of the lower courts, because the present constitution vests it with supervisory control and supervision over inferior courts.<sup>5</sup>

**§ 199. Interlocutory orders of courts may in Alabama be reviewed by the writ of mandamus.**—The ruling in Alabama on this point is also exceptional, and the writ of *mandamus* has been issued: to correct the action of the court in granting or setting aside an attachment for a witness;<sup>6</sup> to revise the action of the court in quashing or refusing to quash an ancillary attachment;<sup>7</sup> to place a cause on the docket when a judgment was made absolute too soon;<sup>8</sup> to reinstate a suit dismissed by consent of court by A., in whose name the suit was brought for B.'s benefit;<sup>9</sup> to restore a suit improperly abated on the death of the plaintiff;<sup>10</sup> to make the court declare a bond for costs to be insufficient, though the court had held otherwise;<sup>11</sup> to enforce an

<sup>1</sup> State v. Lazarus, 36 La. An. 578; State v. Judge, 40 La. An. 206.

<sup>2</sup> State v. Judge, 41 La. An. 951.

<sup>3</sup> State v. Rightor, 40 La. An. 852; State v. Judge Sixth Dist. Court, 32 La. An. 549.

<sup>4</sup> State v. Judge Twenty-sixth Dist. Court, 34 La. An. 1177.

<sup>5</sup> State v. Ellis, 41 La. An. 41.

<sup>6</sup> Hogan v. Alston, 9 Ala. 627.

<sup>7</sup> Gee v. Alabama, etc. Co., 13 Ala. 579; Hudson v. Daily, 13 Ala. 722; Putnam, Ex parte, 20 Ala. 592; Boraim v. De Costa, 4 Ala. 393.

<sup>8</sup> Lowe, Ex parte, 20 Ala. 330.

<sup>9</sup> Brazier v. Tarver, 4 Ala. 569.

<sup>10</sup> State ex rel. Nabor, 7 Ala. 459.

<sup>11</sup> Morgan, Ex parte, 30 Ala. 51.

agreement not to file papers in a pending suit, when the opposing counsel has been allowed to file an amended complaint in contravention thereof;<sup>1</sup> to reinstate a cross-bill dismissed before the final termination of the cause;<sup>2</sup> to revive a suit;<sup>3</sup> to set aside an order for a rehearing when it was granted improperly;<sup>4</sup> to dismiss a suit brought by a non-resident without giving security for costs;<sup>5</sup> to grant an order for a rehearing which was improperly refused;<sup>6</sup> to set aside an order improperly granted restraining a plaintiff from continuing his suit at law till a motion for an election therein was disposed of;<sup>7</sup> to allow temporary alimony and attorneys' fees to a wife during the pendency of a suit for a divorce and before permanent alimony had been set apart for her;<sup>8</sup> to reinstate a cause improperly stricken from the docket;<sup>9</sup> to allow an amendment to a complaint;<sup>10</sup> to change the orders of a court relative to giving bonds in attachment proceedings;<sup>11</sup> to vacate in attachment proceedings an order to pay over the proceeds of a sale to the defendant on a claim of exemption, when the order was wrong and the defendant was insolvent;<sup>12</sup> to correct the error in the ruling of a judge in improperly refusing in vacation to grant a rehearing of a demurrer, which he had then sustained to the defendant's petition for a rehearing, when a judgment had been taken by default.<sup>13</sup> Notwithstanding these decisions there are other decisions from the same court declining to interfere in such cases. A *mandamus* to compel the dissolution of an injunction, upon the filing of the answer, was refused. The court said that it would

<sup>1</sup> Lawrence, Ex parte, 34 Ala. 446.

<sup>2</sup> Thornton, Ex parte, 46 Ala. 384.

<sup>3</sup> Ware, Ex parte, 48 Ala. 223.

<sup>4</sup> North, Ex parte, 49 Ala. 385;

Bruce v. Williamson, 50 Ala. 313.

<sup>5</sup> Cole, Ex parte, 28 Ala. 50; Robbins, Ex parte, 29 Ala. 71.

<sup>6</sup> Walker, Ex parte, 54 Ala. 577.

<sup>7</sup> Alabama, etc. Co., Ex parte, 59 Ala. 192.

<sup>8</sup> King, Ex parte, 27 Ala. 387.

<sup>9</sup> State ex rel. Stow, 51 Ala. 69; Abrams, Ex parte, 48 Ala. 151.

<sup>10</sup> South. & N. Ala. R. R., Ex parte, 65 Ala. 599; Lee v. Harper, 90 Ala. 548.

<sup>11</sup> Haralson, Ex parte, 75 Ala. 543.

<sup>12</sup> Barnes, Ex parte, 84 Ala. 540.

<sup>13</sup> Chastain v. Armstrong, 85 Ala. 215.

not interfere with interlocutory orders, and that such an interference would be an intolerable nuisance.<sup>1</sup> The same reason seems to have controlled the court in refusing a *mandamus* to compel the lower court to strike a case from the docket.<sup>2</sup> The court has refused to interfere by a *mandamus* to compel the court to accept the verdict of a jury,<sup>3</sup> or to grant a change of venue in a criminal case,<sup>4</sup> because such matters were within the discretion of the court. A *mandamus* to vacate an order suppressing depositions was refused. The reason assigned was, that the matter would come up on appeal, and that it would embarrass the court to review in this manner all of the decisions of the lower courts.<sup>5</sup> The court has lately shown a disposition to decline any interference in the case of interlocutory orders. It said that it had gone as far as it was willing in this direction, and was inclined to restrain such jurisdiction, and that it would not award a *mandamus* when full relief could be obtained by appeal, writ of error or otherwise. The improper allowance of an amendment to the pleadings was considered to be no ground for a *mandamus*. The force of this decision was, however, broken by a further statement, that in a proper case the court might grant a *mandamus* to compel the allowance of an amendment to the pleadings.<sup>6</sup> A *mandamus* was refused to compel the court to vacate an order, made at the instance of one of the litigants, setting aside an agreed statement of facts,<sup>7</sup> and to compel a judge to hear and determine a motion, which he had overruled on the ground that he had no jurisdiction to entertain it.<sup>8</sup> In the two last cases the court said that such rulings could be reviewed on appeal from the final judgments.

<sup>1</sup> Montgomery, Ex parte, 24 Ala. 98.

<sup>2</sup> Garland, Ex parte, 42 Ala. 559.

<sup>3</sup> Henry, Ex parte, 24 Ala. 638.

<sup>4</sup> Banks, Ex parte, 28 Ala. 28.

<sup>5</sup> Elston, Ex parte, 25 Ala. 72.

<sup>6</sup> South. etc. R. R., Ex parte, 65 Ala. 599.

<sup>7</sup> Hayes, Ex parte (Ala., April 9, 1891), 9 South. Rep. 156.

<sup>8</sup> Hurn, Ex parte (Ala., June 16, 1891), 9 South. Rep. 515.



§ 200. **Interlocutory orders of courts may in Michigan be reviewed by writs of mandamus.**—In Michigan the rule, that the interlocutory orders in a suit will not be revised or corrected by *mandamus*, has never been recognized. The writ has been issued: to vacate an order vacating the service of process on the defendant;<sup>1</sup> to vacate an order rescinding an order of removal of a cause;<sup>2</sup> to rescind an order to a garnishee, founded on his return, to pay over money and certain notes to a receiver appointed by the court, who was instructed to hold such articles till further orders, because the return did not justify such an order;<sup>3</sup> to vacate an order quashing an attachment sued out against two out of six defendants, because the affidavit was wrongly held to be insufficient;<sup>4</sup> to set aside a default without the payment of costs as required by the court;<sup>5</sup> to set aside an injunction;<sup>6</sup> to vacate an order restoring an appeal which had been dismissed;<sup>7</sup> to vacate the service of a civil *capias* which was wrongfully issued;<sup>8</sup> to vacate the confirmation of the report of commissioners appointed to condemn land, because the confirmation was made at a time when the court could not lawfully make it;<sup>9</sup> to set aside the service of process on a person attending court as a witness in another case, which the lower court had refused to do;<sup>10</sup> to vacate the service of a civil *capias* wrongfully issued;<sup>11</sup> to vacate an order restraining competent proceedings in a

<sup>1</sup> *People v. Wayne Circuit (Judge)*, 22 Mich. 493.

<sup>2</sup> *People v. Wayne Circuit (Judge)*, 39 Mich. 115.

<sup>3</sup> *People v. Cass Circuit Judge*, 39 Mich. 407.

<sup>4</sup> *People v. Bay Co. Cir. Ct. (Judge)*, 41 Mich. 326.

<sup>5</sup> *Arno v. Circuit Court*, 42 Mich. 362.

<sup>6</sup> *Tawas, etc. R. R. v. Cir. Judge*, 44 Mich. 479; *Van Norman v. Cir. Judge*, 45 Mich. 204. A *mandamus* to set aside an injunction will be

refused, unless the court is convinced of the necessity of a summary interference. *Mills v. Brevoort*, 77 Mich. 210; *Detroit (City) v. Hosmer*, 79 Mich. 384.

<sup>7</sup> *Ellair v. Judge*, 46 Mich. 496.

<sup>8</sup> *Baldwin v. Branch Cir. Judge*, 48 Mich. 525.

<sup>9</sup> *Michigan C. R. R. v. Tuscola Co. (Prob. Judge)*, 48 Mich. 638.

<sup>10</sup> *Mitchell v. Huron Co. Judge*, 53 Mich. 541.

<sup>11</sup> *Baldwin v. Branch Ct. Judge*, 48 Mich. 525.

court of co-ordinate jurisdiction;<sup>1</sup> to set aside a verdict and grant a new trial, on account of the misconduct of the jury;<sup>2</sup> to set aside an order, granted on a mere motion, which set aside a decree;<sup>3</sup> to vacate an order setting aside the service of a subpoena and the subsequent proceedings in a foreclosure suit;<sup>4</sup> to grant a new trial;<sup>5</sup> to vacate an order punishing for contempt of court, and to restrain further steps in enforcing an injunction;<sup>6</sup> to vacate a nonsuit;<sup>7</sup> to a chancellor to hear and decide a cause himself, wherein he had entered a decree upon the findings of a jury.<sup>8</sup> The court has declined to enter into the investigation of the merits of a chancery case till there was a final judgment and the case was brought regularly before the court;<sup>9</sup> and it will interfere to disturb the action of a judge in equity only in a case of exigency demanding prompt action.<sup>10</sup> A *mandamus* lies in Michigan to correct the action of the trial court in ordering the plaintiff to give a bill of the particulars of his demand, if such order goes beyond what is properly required to be stated in such a bill.<sup>11</sup> Where, however, a party was convicted of murder, which judgment was reversed and a new trial ordered, whereupon the court admitted him to bail, but during the second trial ordered him into custody, a *mandamus* was refused to compel the trial court to admit him again to bail.<sup>12</sup>

**§ 201. Mandamus cannot take the place of an appeal or writ of error.**—Under the general rule, that a *man-*

<sup>1</sup> Maclean v. Speed, 52 Mich. 257.

<sup>6</sup> Scott v. Chambers, 62 Mich. 532.

<sup>2</sup> Churchill v. Emerick, 56 Mich. 536.

<sup>7</sup> Lindsay v. Circuit Judge, 63 Mich. 735.

<sup>3</sup> York v. Ingham, 57 Mich. 421.

<sup>8</sup> Brown v. Buck, 75 Mich. 274.

<sup>4</sup> Low v. Mills, 61 Mich. 35.

<sup>9</sup> Chesebro v. Montgomery, 70 Mich. 650.

<sup>5</sup> Gray v. Barton, 62 Mich. 186.

The discretion of a court in refusing a new trial will only be interfered with to correct an abuse thereof. The abuse of discretion must be gross and palpable to justify an interference in any case. Detroit, etc. Co. v. Gartner, 75 Mich. 360.

<sup>10</sup> Detroit, etc. R. R. v. Newton, 61 Mich. 33.

<sup>11</sup> Van Vranken v. Gartner, 85 Mich. 140.

<sup>12</sup> Hull v. Reilly, 87 Mich. 497; 49 N. W. Rep. 869.

*damus* will not lie where the law has provided another remedy, this writ will not lie to review or correct a judgment or decree, where the law provides a remedy by appeal or writ of error.<sup>1</sup> The inconvenient delay attending an appeal is no ground for a *mandamus*.<sup>2</sup> A *mandamus* will not be allowed to usurp the functions of an appeal, a writ of error or a *certiorari*,<sup>3</sup> or to anticipate or forestall judicial action.<sup>4</sup> Because the action of the court was a final judgment from which an appeal lay, the writ of *mandamus*

<sup>1</sup> Baltimore, etc. R. R., *Ex parte*, 108 U. S. 566; *Hemphill v. Collins*, 117 Ill. 396; *State v. Engelman*, 86 Mo. 551; *Kendall v. Lassiter*, 68 Ala. 181; *State v. Lubke*, 85 Mo. 338; *State v. Orphans' Court* (Judge), 15 Ala. 740; *State v. Kincaid*, 23 Neb. 641. In a few instances this rule has been departed from. Where a judgment was granted without proper notice to the defendant, which the court refused to set aside, *mandamus* was considered to be the only remedy. *People v. Bacon*, 18 Mich. 247. In another case it was held that the issuance of the writ was optional with the court. *Lloyd v. Chambers*, 56 Mich. 236. The writ was refused, in one instance, because the writ of error would contain everything necessary to determine the matter. *Olson v. Muskegon Circuit Judge*, 49 Mich. 85. A *mandamus* was considered to be preferable to a writ of error where an indictment was wrongfully quashed for supposed lack of jurisdiction. *People v. Swift*, 59 Mich. 529. A *mandamus* was considered to be admissible to compel a judge to dissolve a writ of prohibition (*Ray, Ex parte*, 45 Ala. 15; *Boothe, Ex parte*, 64 Ala. 312), and to reverse the action of the court improperly granting

(*North, Ex parte*, 49 Ala. 385) or refusing (*O'Neal v. Kelly*, 72 Ala. 559) a rehearing. Where a court refused to entertain proceedings for contempt for disobedience of an injunction, holding erroneously that an appeal suspended the injunction, a *mandamus* was allowed to compel it to issue an attachment and examine into the matter, on the ground that an appeal was not speedy nor adequate relief. *Merced Min. Co. v. Fremont*, 7 Cal. 130.

<sup>2</sup> *Perry, Ex parte*, 102 U. S. 183. To allow a *mandamus* for that reason would overload the higher court, and would render the position of the judge of the lower court intolerable. *State v. Horner*, 16 Mo. Ap. 191.

<sup>3</sup> *Hoard, Ex parte*, 105 U. S. 578; *State v. County Court*, 33 W. Va. 589; *Morgan, Ex parte*, 2 Chit. 250; *Little v. Morris*, 10 Tex. 263; *Ewing v. Cohen*, 63 Tex. 482; *State v. Wright*, 4 Nev. 119; *Railway Co., Ex parte*, 103 U. S. 794; *Smyth v. Titcomb*, 31 Me. 272; *People v. District Court*, 14 Colo. 396; *State v. Nelson*, 21 Neb. 572; *State v. Cooper Co. Court*, 64 Mo. 170; *Jansen v. Davison*, 2 John. Cas. 72; *Miller v. Tucker Co. Court*, 34 W. Va. 285.

<sup>4</sup> *Page v. Clopton*, 30 Grat. 415.

has been refused: to set aside a dismissal for failure to pay costs pursuant to an order of continuance;<sup>1</sup> to amend a judgment for the work of a mechanic so as to make it a lien on the land, as prayed in the petition;<sup>2</sup> to vacate a judgment entered *nunc pro tunc*, the plaintiff having died after the referee's report was made, but before the judgment was entered;<sup>3</sup> to set aside an order sending a case for trial to the probate court on a plea to the jurisdiction;<sup>4</sup> to compel the entry of a judgment for costs;<sup>5</sup> to set aside a dismissal of a rule to show cause why an execution should not issue,<sup>6</sup> and to compel the granting of letters of administration to *A. pendente lite*.<sup>7</sup> Where a judgment for the plaintiff is arrested, he should apply for a judgment against himself, and upon refusal to grant such judgment a *mandamus* will lie to compel the granting thereof. Then, after the judgment is granted, the plaintiff can appeal.<sup>8</sup> A *mandamus* will not lie to compel a court to render a judgment of acquittal in a criminal case. If the defendant is put on trial again, the matter can be determined on appeal.<sup>9</sup> A *mandamus* will not lie to a county judge to recall an order made after the final judgment, since such order can be brought up by appeal.<sup>10</sup> Where, however, such appellate proceedings will not be an adequate remedy, the fact that they may be resorted to will not be a bar to seeking redress by *mandamus*.<sup>11</sup> On account of the absence of other remedy, a *mandamus* will lie: to vacate an order of discovery improperly granted, compelling the production and deposit of a party's business books;<sup>12</sup> to set aside an order quashing an indictment alleged not to be properly found;<sup>13</sup> to set aside the dismissal of an appeal from a nonsuit, since a return to a writ of

<sup>1</sup> Hendree, Ex parte, 49 Ala. 360.

<sup>2</sup> Schmidt, Ex parte, 63 Ala. 252.

<sup>3</sup> Koon, Ex parte, 1 Denio, 644.

<sup>4</sup> State v. Morgan, 12 La. 118.

<sup>5</sup> Peralta v. Adams, 2 Cal. 594.

<sup>6</sup> State v. Judge Fourth Dist., 19 La. An. 4.

<sup>7</sup> Barksdale v. Cobb, 16 Ga. 13.

<sup>8</sup> Bostwick, Ex parte, 1 Cow. 143.

<sup>9</sup> Cage, Ex parte, 45 Cal. 248.

<sup>10</sup> People v. Moore, 29 Cal. 427.

<sup>11</sup> Merced Mining Co. v. Fremont, 7 Cal. 130.

<sup>12</sup> People v. Kent Cir. Ct. (Judge), 38 Mich. 351.

<sup>13</sup> People v. Swift, 59 Mich. 529.

error will not disclose the whole proceedings on the special motion to dismiss;<sup>1</sup> and to review the circuit court's action in ordering a justice of the peace to make return of a case appealed from his decision, wherein his fees for such return have not been paid.<sup>2</sup> If a writ of error is informal, the remedy of the defendant in error is to vacate the writ, and not to ask for a *mandamus* to carry the judgment into execution.<sup>3</sup> Where through his own negligence a party has permitted the time allowed for taking his appeal to pass without utilizing it, he will not therefore be allowed to review the action of the court by a *mandamus*. A neglect to avail himself of the remedies allowed to a person by law is no reason why other remedies not allowed to him should be accorded to him.<sup>4</sup>

**§ 202. Mandamus will not always lie, though appeal or writ of error not allowable.**— Though it has been said that a *mandamus* will not lie when an appeal or writ of error is admissible, yet the converse of this proposition must not be considered to be of universal acceptance. A judgment of a court is a judicial determination, and the general rule is, that a *mandamus* does not lie to review or vacate the decision of any tribunal intrusted with deliberation and judgment, and it has been refused, though no other mode of review was admissible.<sup>5</sup> As has been stated before, a *mandamus* will not lie to review a decision which the law evidently intended to be final.<sup>6</sup>

**§ 203. Mandamus lies to compel a court to try a cause, when it refuses to do so upon the erroneous decision that it has no jurisdiction.**— When a court refuses to proceed and try a cause, erroneously deciding that it has no jurisdiction, it will be compelled by the writ of *mandamus*

<sup>1</sup> *People v. Wayne Cir. Ct.* 29 Wis. 79; *State v. Buhler*, 90 Mo. 560. (Judge), 30 Mich. 98.

<sup>2</sup> *People v. Allegan Circuit* 5 *Ewing v. Cohen*, 63 Tex. 482; (Judge), 29 Mich. 487. *State v. Wright*, 4 Nev. 119; *People*

<sup>3</sup> *French, Ex parte*, 100 U. S. 1. *v. Garnett*, 130 Ill. 340.

<sup>4</sup> *State v. Sheboygan Co. (Sup'rs)*, <sup>5</sup> See §§ 47, 48, 313.

to assume jurisdiction and proceed with the cause.<sup>1</sup> The same rule applies in proceedings for contempt of court,<sup>2</sup> and in criminal cases.<sup>3</sup> The writ will be granted when the court improperly declines to hear a cause, alleging its own incompetency or that of the petitioner.<sup>4</sup> Where, however, a defendant has entered a plea to the jurisdiction which has been sustained, and the action has been dismissed, a *mandamus* has been refused, because there was a final judgment in such case from which a writ of error would lie, and therefore there was no call for a *mandamus*, which ordinarily only issues when there is no other adequate remedy.<sup>5</sup> A dismissal of a writ of error by a territorial supreme court, for failure to docket it in time, was not considered to be a final judgment, and, as neither a writ of error nor an appeal would lie from such action, a *mandamus* was considered to be the only remedy to compel a hearing of the writ of error.<sup>6</sup> When a court refused to take cognizance of an ap-

<sup>1</sup> *People v. Swift*, 59 Mich. 529; *State v. Warner*, 55 Wis. 271; *Ex parte Parker*, 120 U. S. 737; *Ex parte Schollenberger*, 96 U. S. 369; *Ex parte Pennsylvania Co.*, 137 U. S. 451, 11 S. C. R. 141; *State v. Murphy*, 19 Nev. 89; *R. v. Kent (Just.)*, 14 East, 395; *Beguhl v. Swan*, 39 Cal. 411; *Ex parte Russell*, 13 Wall. 664; *Floral, etc. Co. v. Rives*, 14 Nev. 431; *State v. County Commissioners*, 83 Ala. 304; *Ex parte Dickson*, 64 Ala. 188; *R. v. Monmouth*, L. R. 5 Q. B. 251; *Kent v. Dickinson*, 25 Grat. 817; *State v. Hamilton Co. (Commissioners)*, 26 Ohio St. 364; *Cowan v. Fulton*, 23 Grat. 579; *Cavanaugh v. Wright*, 2 Nev. 166; *State v. Sachs (Wash., Nov. 12, 1891)*, 27 Pac. Rep. 1075; *Ex parte Henderson*, 6 Fla. 279; *Hollon Parker, Petitioner*, 131 U. S. 221; *Ex parte United States*, 16 Wall. 699; *Ex parte Parker*, 120 U. S. 737; *Territory v. Judge District Court*, 5

Dak. 275. *Contra*, *People v. Garnett*, 130 Ill. 340.

<sup>2</sup> *Temple v. Superior Court*, 70 Cal. 211.

<sup>3</sup> *State v. Laughlin*, 75 Mo. 358; *People v. Scates*, 3 Scam. 351.

<sup>4</sup> *Ex parte Russell*, 13 Wall. 664.

<sup>5</sup> *Ex parte Pennsylvania Co.*, 137 U. S. 451, 11 S. C. R. 141; *Ex parte Baltimore, etc. R. R.*, 108 U. S. 566. The same conclusion was reached in *People v. Garnett*, 130 Ill. 340. The court considered that, in dismissing a case for want of jurisdiction, a court judicially determines a question incident to the proceedings, and in passing on it acts judicially, and that a *mandamus* would not lie to reinstate the case. Though there might be no other mode of reviewing the action of the court, yet a *mandamus* was not considered to be admissible.

<sup>6</sup> *Harrington v. Holler*, 111 U. S. 796.

peal, claiming that the proper preliminary steps had not been taken, and dismissed it, a *mandamus* was granted to compel the court to hear the appeal.<sup>1</sup>

§ 204. When a court for any cause improperly refuses to proceed in a cause, *mandamus* lies to compel action. So, if for any reason a court refuses to act or entertain the question for its decision, and such duty is enjoined on it by law, a *mandamus* can be obtained to compel the court to consider the question.<sup>2</sup> In such cases the court is required to proceed, but is not instructed to adopt any particular conclusion or judgment.<sup>3</sup> The writ has been issued to compel a court to proceed in a cause: which had been remanded to it from the federal court;<sup>4</sup> which had been transferred to it from another state court;<sup>5</sup> when it had stayed all proceedings till its further order;<sup>6</sup> when it had refused to try the cause till other unknown persons were made parties to it,<sup>7</sup> till a cause pending in another court was determined,<sup>8</sup> or till the plaintiff had filed an account;<sup>9</sup> and when it had continued the cause without a proper showing.<sup>10</sup> By this writ it may be stated generally, that a court will be required to hear and determine a cause, or, if the cause has been heard, to render a judgment or enter up a decree.<sup>11</sup> The judge must render his decision within a reasonable time

<sup>1</sup> *Ex parte Parker*, 120 U. S. 737.

<sup>2</sup> *Knarr's Petition*, 127 Pa. St. 554; *Hollon Parker, Petitioner*, 131 U. S. 221; *Austen v. Probate Court*, 35 Mo. 198; *People v. De La Guerra*, 43 Cal. 225; *Union Colony v. Elliott*, 5 Colo. 371; *Brem v. Arkansas Co. Court*, 9 Ark. 240.

<sup>3</sup> *Ex parte Shandies*, 66 Ala. 134; *Ewing v. Cohen*, 63 Tex. 482; *Board of Police v. Grant*, 9 Sm. & M. 77; *Jones v. Allen*, 13 N. J. L. 97; *Life, etc. Co. v. Adams*, 9 Pet. 571; *Territory v. Ortiz*, 1 N. Mex. 5; *Ex parte Hoyt*, 13 Pet. 279; *State v. Kendall*, 15 Neb. 262; *People v. District Court*, 14 Colo. 396; *Oneida C.*

*Pleas (Judges) v. People*, 18 Wend. 79; *Territory v. Judge Dist. Ct.*, 5 Dak. 275.

<sup>4</sup> *Kleiber v. McManus*, 66 Tex. 48.

<sup>5</sup> *People v. Zane*, 105 Ill. 662; *State v. O'Bryan*, 102 Mo. 254.

<sup>6</sup> *Rhodes v. Craig*, 21 Cal. 419; *Culver v. Judge*, 57 Mich. 25.

<sup>7</sup> *State v. Commercial Court (Judge)*, 4 Rob. 227.

<sup>8</sup> *Avery v. Contra Costa Co. (Sup. Ct.)*, 57 Cal. 247; *Dunphy v. Belden*, 57 Cal. 427; *Budd v. New Jersey, etc. Co.*, 14 N. J. L. 467.

<sup>9</sup> *People v. Pearson*, 1 Scam. 458.

<sup>10</sup> *Dixon v. Field*, 10 Ark. 243.

<sup>11</sup> *State v. Williams*, 69 Ala. 311;

after the cause is submitted to him.<sup>1</sup> A delay of five months was considered to be too great, and the writ was issued requiring the judge to decide the cause at once.<sup>2</sup> The writ has also been issued: to compel the granting of the probate of a will;<sup>3</sup> to compel the commissioners of a bankrupt to issue a warrant for his further examination;<sup>4</sup> to compel an officer before whom a prisoner is brought on *habeas corpus*, after commitment from a justice to await indictment, to hear and pass on the evidence offered touching his guilt;<sup>5</sup> to compel a probate court to proceed and settle the accounts of an administrator;<sup>6</sup> to compel the reinstatement of a cause improperly stricken from the docket.<sup>7</sup> Where, however, a court puts off a hearing of an application only for a reasonable time, *mandamus* will not lie, since there is no abuse of the discretion of the court.<sup>8</sup> A *mandamus* will not be issued to compel a circuit court to proceed and try a cause, when an injunction has been allowed in that or in some other court to restrain further proceedings in such cause;<sup>9</sup> and for a similar reason a probate judge was not required to proceed in the settlement of an estate.<sup>10</sup>

§ 205. **Disputed question whether appeal or mandamus lies upon the erroneous dismissal of an appeal by the lower court.**—Since, in order to enforce the performance of a plain duty, a *mandamus* may issue to a court which improperly omits or declines to proceed in a cause, it is argued that the dismissal of an appeal is a refusal to proceed, and that, therefore, a *mandamus* will run to compel a court to entertain an appeal which it has wrongfully

Miller v. Tucker Co. Court, 34 W. Va. 285.

<sup>1</sup>Com. v. McLaughlin, 120 Pa. St. 518.

<sup>2</sup>State v. Lazarus, 37 La. An. 610, 614.

<sup>3</sup>Justice and Jones, 1 Barn. 280.

<sup>4</sup>Bromley, In re, 3 D. & R. 310.

<sup>5</sup>Ex parte Mahone, 30 Ala. 49.

<sup>6</sup>Shadden v. Sterling, 23 Ala. 518.

<sup>7</sup>State ex rel. Stow, 51 Ala. 69; Ex parte Lowe, 20 Ala. 330; State v. Cape Girardeau C. P. Court, 73 Mo. 560.

<sup>8</sup>Stone v. McCann, 79 Cal. 460.

<sup>9</sup>People v. Muskegon Cir. Ct. (Judge), 40 Mich. 63.

<sup>10</sup>State v. Orphans' Court (Judge), 15 Ala. 740.



dismissed.<sup>1</sup> On the other hand, it is claimed that the dismissal of an appeal is a judicial action, and that a *mandamus* does not lie to review judicial action or to correct judicial errors,<sup>2</sup> though there be no other mode of reviewing such ruling.<sup>3</sup> It is claimed that a *mandamus* does not lie to make a court give a particular judgment, but merely to give a judgment, and this by its dismissal of the appeal it has already done, and that in such cases a writ of error will lie, and that, such other remedy existing, it is not proper to allow a *mandamus*.<sup>4</sup> With many courts the right to issue a *mandamus* in such cases seems to turn on the question whether such dismissal of an appeal is to be regarded as a final judgment, in which case a *mandamus* is refused, because another remedy is provided by statute, namely, an appeal or writ of error.<sup>5</sup> This rule is adopted by the supreme court of the United States. In that court, when an appeal has been dismissed by a lower court upon a formal plea to the jurisdiction, such dismissal is regarded as a final judgment, which may be reviewed by appeal or writ of error, and a *mandamus* to review such action will be refused.<sup>6</sup> On the other hand, that court has granted a writ of *mandamus* to compel a circuit court to reinstate and hear an appeal in a bankruptcy case from a district court,<sup>7</sup> and to compel a court to reinstate an appeal which it had wrongfully refused to entertain on account of alleged irregularities in perfecting the appeal.<sup>8</sup> The weight of authority seems to be that a writ of *mandamus* will lie in all cases to compel the reinstate-

<sup>1</sup> Jones v. Allen, 13 N. J. L. 97;  
Ten Eyck v. Farlee, 16 N. J. L. 348;  
Freas v. Jones, 16 N. J. L. 358;  
Adams v. Mathis, 18 N. J. L. 310.

<sup>2</sup> Ewing v. Cohen, 63 Tex. 482;  
People v. Dutchess C. Pleas, 20  
Wend. 658; State v. Wright, 4 Nev.  
119; People v. Weston, 28 Cal. 639;  
Goheen v. Myers, 18 B. Mon. 423;  
State v. Smith, 105 Mo. 6; 16 S. W.  
Rep. 1052.

<sup>3</sup> People v. Garnett, 130 Ill. 340.

<sup>4</sup> Com. v. Philadelphia C. P.  
(Judges), 3 Binn. 273.

<sup>5</sup> State v. Smith, 19 Wis. 531;  
Goheen v. Myers, 18 B. Mon. 423.

<sup>6</sup> Baltimore, etc. R. R., Ex parte,  
108 U. S. 566; Railway Co., Ex  
parte, 103 U. S. 794.

<sup>7</sup> Insur. Co. v. Comstock, 16 Wall.  
258.

<sup>8</sup> Hollon Parker, Petitioner, 131  
U. S. 221.

ment of an appeal, except when another remedy, as appeal or writ of error, is provided by statute, or the law evidently contemplates that the action of the court which dismissed the appeal shall be final.<sup>1</sup>

§ 206. When an appeal is wrongfully dismissed for matters occurring subsequent to its docketing, it may be reinstated on the docket by a mandamus.—When an appeal has been wrongfully dismissed for matters occurring subsequent to its docketing, as for lack of prosecution or for errors, which the party should have been allowed to correct by amendment, a *mandamus* has been granted to reverse such action.<sup>2</sup> In those states where such action is considered to be a final judgment, an appeal or writ of error would be the proper remedy, provided there be an appellate court with authority to review such final judgments. The existence of such a remedy is considered to be a good reason why a writ of *mandamus* should be refused. Where a court wrongfully dismissed an appeal on account of matters occurring subsequent to its docketing, a *mandamus* was issued to compel the reversal of such action. The power to issue the writ in that case was claimed by virtue of a superintending control over all other courts, given by the constitution to the higher court, though in the case in hearing such court had no appellate jurisdiction. This superintending control was held to be as broad as the exigency of the case demanded. The court reviewed the question of the legality of the issue of the writ of *mandamus* in such cases, and considered the law on the subject to be in a state of “painful vibration.”<sup>3</sup>

<sup>1</sup> Among the cases which have allowed the writ in such cases may be cited: *Hart v. Circuit Judge*, 56 Mich. 592; *People v. Cir. Judge Third Circuit*, 19 Mich. 296; *State v. Bergen C. Pleas (Judges)*, 2 Penn. 737. 27 Mich. 303; *Garrabrant v. McCloud*, 15 N. J. L. 462; *Ten Eyck v. Farlee*, 1 J. Harr. (N. J.), 269, 348; *Thorpe v. Keeler*, 3 Harr. (N. J.), 251; *Brown, Ex parte*, 116 U. S. 401.

<sup>3</sup> *State v. Philips*, 97 Mo. 331.

<sup>2</sup> *People v. Wayne Cir. Ct. (Judge)*,

§ 207. When a mandamus lies to compel a court to hear a cause when it has declined to hear it by reason of an erroneous decision on some preliminary question.—When a court has refused to go into the merits of the action on an erroneous construction of some question of practice preliminary to the whole case, a *mandamus* will issue to compel it to go on and try the case.<sup>1</sup> In fact the erroneous decisions of a court upon preliminary questions, which induce it to decline to proceed further, may be reviewed by this writ, if such questions are questions of law, and also when such questions are questions of fact, provided the general nature of the duties whose performance is sought by this writ are considered to be ministerial, and the law did not intend the decision of the lower court on such preliminary matters to be final.<sup>2</sup>

§ 208. Mandamus to compel the allowance of an appeal.—Where a party is entitled to an appeal from a decree or judgment against him, he may by the assistance of the writ of *mandamus* compel the allowance of such an appeal, the duties of the court in such case being merely ministerial.<sup>3</sup> The court will be required by this writ to do all acts necessary to make the right of appeal efficacious: to enter a *nunc pro tunc* order as of date of the motion;<sup>4</sup> to make a record of the allowance of an appeal from a judgment of the probate court;<sup>5</sup> to allow an appeal from the probate of a codicil to a will;<sup>6</sup> to make out and deliver a transcript for the appeal or writ of error;<sup>7</sup> and to entertain an application for the examination of an appeal bond, and, if found sufficient, to grant a *supersedeas*.<sup>8</sup> It is no objec-

<sup>1</sup> State v. Ellis, 41 La. An. 41.

<sup>2</sup> See §§ 44, 45, 46, 47 and 48, where the question is reviewed.

<sup>3</sup> Ware v. McDonald, 62 Ala. 81; People v. Prendergast, 117 Ill. 588; State v. Murphy, 41 La. An. 526; Hall v. Audrain Co. (Court), 27 Mo. 329; United States v. Gomez, 3

Wall. 752; Louisville Ind. School v. Louisville (City), 88 Ky. 584.

<sup>4</sup> McCreary v. Rogers, 35 Ark. 298.

<sup>5</sup> Beebe v. Lockert, 6 Ark. 422.

<sup>6</sup> Greathouse v. Jameson, 3 Colo. 397.

<sup>7</sup> Rodgers v. Alexander, 35 Tex. 116.

<sup>8</sup> State v. Lewis, 71 Mo. 170.

tion that the time for the doing of the act by the judge or court has expired, if the application was made in proper time. A party is not to be deprived of such rights by the negligence of public officers.<sup>1</sup>

§ 209. **Mandamus will not lie to a court when there is another remedy.**—Since a writ of *mandamus* issues because there is no other adequate remedy, and justice and good government require a redress of the wrong, a court will not be required by this writ to take any action when another remedy is provided. A *mandamus* will not lie to compel a court to set aside its order, which set aside an office judgment and allowed a party to plead, because the relator can ask for an execution on that judgment, and upon the refusal to grant his request can appeal to the appellate court.<sup>2</sup> In committing a party to jail, or in requiring bond for his appearance to answer to a charge of crime, the judge or court acts judicially, and the correctness of the order or judgment cannot be inquired into by a *mandamus*. A *mandamus* will not lie to compel a court or magistrate to discharge a person alleged to be improperly detained under process therefrom. A *habeas corpus* is the usual remedy.<sup>3</sup> A *mandamus* will be refused: to compel a judge, whose brother-in-law is to be tried before him, to interchange with another judge, when the law provides that a lawyer may be selected to try the case;<sup>4</sup> to compel a circuit court to grant an appeal when the appellate court can grant it;<sup>5</sup> to compel a court to approve the security for a writ of error when a justice of the appellate court can do it;<sup>6</sup> to compel the court to withdraw its order not allowing a transcript to be made, though an appeal has been granted, till the appeal bond is filed, since a writ of error will take up the transcript as effectually as an appeal.<sup>7</sup>

<sup>1</sup> State v. Lewis, 71 Mo. 170.

<sup>5</sup> Byrne v. Harbison, 1 Mo. 225.

<sup>2</sup> Goolsby, Ex parte, 2 Grat. 575.

<sup>6</sup> Virginia Com'rs, Ex parte, 112 U. S. 177.

<sup>3</sup> Graves, Ex parte, 61 Ala. 381.

<sup>4</sup> State v. Judges, 29 La. An. 785.

<sup>7</sup> State v. Engleman, 45 Mo. 27.

§ 210. Litigants cannot by agreement create duties which courts may be compelled by mandamus to perform.— Since the writ of *mandamus* lies only to enforce duties imposed by law, litigants cannot by their agreements create such duties for courts and ask for the assistance of this writ to compel the courts to perform them. A *mandamus* will not lie, where there is no law creating the duty: to compel a court to change the venue of a criminal case on the agreement of the parties;<sup>1</sup> to compel a court to sign the report of the referees by virtue of a stipulation of the litigants, that referees should be appointed by the court to determine certain disputed facts, whose report, when filed, should be the finding of the court and should be signed by the judge;<sup>2</sup> to compel a chancellor to dismiss a cause on motion in pursuance of a written agreement between the parties,<sup>3</sup> or to compel a court to strike a cause from the docket on motion, on the ground that it has been discontinued by a submission to arbitration.<sup>4</sup>

§ 211. Special instances where a mandamus was not required or would have been inefficacious.— A writ of *mandamus* will not run to a court acting under a special commission, which has expired by its own limitation.<sup>5</sup> Where a non-resident was arrested and required to give bail, which he did, a *mandamus* to discharge his bail was refused; if the arrest was valid no wrong was done, and if the arrest was invalid his bail was not liable.<sup>6</sup> Where property was paid into the probate court in condemnation proceedings and wrongfully detained by the judge from the party entitled to it, it was considered that the judge held the property as an individual, and that an action on his bond was the remedy, and that a *mandamus* would not lie to compel payment till an action on the bond had proved unavailing.<sup>7</sup>

<sup>1</sup> Dennis, Ex parte, 48 Ala. 304.

<sup>5</sup> People v. Monroe O. and Termini-

<sup>2</sup> State v. McArthur, 23 Wis. 427.

ner, 20 Wend. 108.

<sup>3</sup> Rowland, Ex parte, 26 Ala. 133.

<sup>6</sup> Small, Ex parte, 25 Ala. 74.

<sup>4</sup> Garlington, Ex parte, 26 Ala.

<sup>7</sup> State v. Meiley, 22 Ohio St. 534.

§ 212. **Mandamus to justices of the peace.**— The writ of *mandamus* has often been issued to compel justices of the peace to perform their ministerial duties or to proceed to take action in judicial matters. By this writ a justice has been compelled: to issue summons against certain parties for combining and conspiring to break the peace;<sup>1</sup> to hear and determine an information brought before them;<sup>2</sup> to allow a change of venue in a suit when the law had been complied with;<sup>3</sup> to hear an appeal;<sup>4</sup> to assess the damages on the dismissal of a case in replevin;<sup>5</sup> to render judgment on the verdict of a jury,<sup>6</sup> but not when the verdict is void;<sup>7</sup> to make correct entries in his docket according to the real facts;<sup>8</sup> to render a judgment of dismissal;<sup>9</sup> to proceed with the preliminary examination of one charged with an offense;<sup>10</sup> to tax the costs on the dismissal of a suit;<sup>11</sup> to compel the allowance of the examination of a garnishee, which he refused to allow on the ground that his judgment against the principal was invalid, when such judgment was in reality legal;<sup>12</sup> to make a true record of the judgment rendered and furnished a copy thereof;<sup>13</sup> to issue an execution

<sup>1</sup> Q. v. Adamson, 1 Q. B. D. 201.

<sup>3</sup> State v. Clayton, 34 Mo. Ap. 563.

<sup>2</sup> Rex v. Tod, 1 Stra. 530; Q. v. Brown, 7 Ellis & B. 757; People v. Barnes, 66 Cal. 594. A return that they had heard and dismissed the information, because it was filed after the time limited by the statute, was considered to be good, as showing that the information had been heard. Q. v. Mainwaring, Ellis, B. & C. 474. Where it was doubtful from the evidence offered whether a prior action for the same cause was dismissed on the merits or for error in law, upon the decision whereof depended the right to bring the suit then pending, the court required the justices to set aside their dismissal of such suit and to rehear it. Q. v. Bridgman, 15 L. J. N. S. 44, M. C.

<sup>4</sup> King v. Suffolk (Just.), 1 B. & A. 640.

<sup>5</sup> Johnson v. Dick, 69 Mich. 108.

<sup>6</sup> Foreman v. Murphy, Penn. 1024.

<sup>7</sup> Moore v. State, 72 Ind. 358.

<sup>8</sup> State v. Van Ellis, 69 Wis. 19.

<sup>9</sup> Anderson v. Pennie, 32 Cal. 265.

<sup>10</sup> People v. Barnes, 66 Cal. 594.

<sup>11</sup> State v. Engle, 127 Ind. 457.

<sup>12</sup> State v. Eddy, 10 Mont. 311.

<sup>13</sup> Smith v. Moore, 38 Conn. 105. A court will refuse to issue a *mandamus* to correct the entry of his judgment, if the application is made a long time after its rendition. Garnett v. Stacy, 17 Mo. 601. An entry by a justice of the peace in his docket of the time of presentation to him of an appeal bond is a determination by the proper tribunal

on his judgment,<sup>1</sup> even though the judgment is erroneous, provided it is not void;<sup>2</sup> to issue a writ of restitution in execution of a judgment in favor of a plaintiff under the landlord and tenant act, when the appeal bond in the case was not filed within the time prescribed by the rules of court;<sup>3</sup> to issue an execution on his judgment, though his judgment has been reversed on appeal, when by law no appeal was allowed;<sup>4</sup> to issue a *supersedeas* to his execution upon the defendant's filing his schedule of exempt property;<sup>5</sup> to grant an appeal upon compliance by the appellant with the requirements of the law,<sup>6</sup> when the law had furnished no other mode of obtaining the allowance of the appeal;<sup>7</sup> to certify a case upon appeal to the higher court with the proper papers;<sup>8</sup> to make up his record in due form in an appeal case, and to furnish the appellant with a copy in due form of the recognizance taken, though entered on his docket only by a minute entry;<sup>9</sup> to sign a bill of exceptions as provided by law;<sup>10</sup> to approve a proper bond, offered for an appeal;<sup>11</sup> and to keep his office in the precinct for which he was elected.<sup>12</sup> Where a justice of the peace has a discretion as to his action, a *mandamus* will not lie, as in accepting the report of referees in a cause and entering up judgment thereon,<sup>13</sup> or in refusing to transfer a cause.<sup>14</sup> A

of the fact of the time when the same was presented for purposes of appeal. It thus involves the ascertainment and record of a question of fact, the entry of which cannot be regarded as a purely ministerial act. A *mandamus* to make a justice of the peace correct such an entry was refused. *Mooney v. Edwards*, 51 N. J. L. 479.

<sup>1</sup> *Terhune v. Barcalow*, 11 N. J. L. 38; *King and Montague*, 1 Barn. 72; *Hamilton v. Tutt*, 65 Cal. 57.

<sup>2</sup> *Hogue v. Fanning*, 73 Cal. 54.

<sup>3</sup> *Kirk v. Cole*, 3 MacArthur, 71.

<sup>4</sup> *Laird v. Abrahams*, 15 N. J. L. 22.

<sup>5</sup> *Smith v. Ragsdale*, 36 Ark. 297.

<sup>6</sup> *Martin, Ex parte*, 5 Ark. 371; *Morris, Ex parte*, 11 Grat. 292; *Levy v. English*, 4 Ark. 65.

<sup>7</sup> *State v. McAuliffe*, 48 Mo. 112; *Chicago, etc. R. R. v. Franks*, 55 Mo. 325.

<sup>8</sup> *Orange (Town) v. Bill*, 29 Vt. 442; *People v. Harris*, 9 Cal. 571.

<sup>9</sup> *Ballou v. Smith*, 29 N. H. 530.

<sup>10</sup> *Ohio v. Wood*, 22 Ohio St. 537.

<sup>11</sup> *Cox v. Rich*, 24 Kans. 20.

<sup>12</sup> *State v. Shropshire*, 4 Neb. 411.

<sup>13</sup> *Farwell, Petition of*, 2 N. H. 123.

<sup>14</sup> *People v. Hubbard*, 22 Cal. 34.

*mandamus* will not lie to compel a justice of the peace to treble the damages in a judgment in forcible entry and detainer, since there is a remedy by appeal.<sup>1</sup> Where a magistrate has by judgment committed the accused to jail, he cannot be required to examine the witnesses in the case and reduce their testimony to writing, as he has no longer any jurisdiction of the case.<sup>2</sup> When an appeal from a justice of the peace is pending in the circuit court, the question of the jurisdiction of the circuit court can be determined there, and will not be determined by a *mandamus* to compel the justice to issue an execution, because a *mandamus* is only issued when there is no other remedy.<sup>3</sup> A magistrate who has convicted a person will not be compelled to levy the penalty of such conviction, when it is shown by the return that the conviction was illegal because there was no law making the act charged an offense.<sup>4</sup> The courts will not compel a magistrate to do an act, where they see a legal probability that an action may be maintained against him for such action,<sup>5</sup> especially where no indemnity has been tendered to him.<sup>6</sup>

<sup>1</sup> Early v. Mannix, 15 Cal. 149.

King v. Mirehouse, 2 Ad. & E. 632;

<sup>2</sup> State v. Miller, 1 Lea, 596.

King v. Broderip, 5 B. & C. 239, 7

<sup>3</sup> People v. Huntoon, 71 Ill. 536.

D. & R. 861; King v. Halls, 3 A. &

<sup>4</sup> King v. Robinson, 2 Smith (K.

E. 494.

B.), 274.

<sup>6</sup> King v. Somersetshire (Just.), 4

<sup>5</sup> King v. Greame, 2 Ad. & E. 615; N. & M. 394.



## CHAPTER 15.

### WHAT COURTS ISSUE THE WRIT OF MANDAMUS.

- § 213. Courts of general common-law jurisdiction issue writs of *mandamus*.
214. In issuing writs of *mandamus* courts exercise original or appellate jurisdiction.
215. Issue of writs of *mandamus* by appellate courts.
216. Issue of *mandamus* by the United States supreme court.
217. Issue of writs of *mandamus* by subordinate federal courts.
218. *Mandamus* by federal courts to levy a tax to pay their judgments.

§ 213. Courts of general common-law jurisdiction issue writs of *mandamus*.—The power of any court to issue the writ of *mandamus* is generally settled by constitutional provision or by statute. In the absence of any such provision, such power is considered to be lodged in that court whose jurisdiction corresponds with that of the court of king's bench. Such court is the highest court of original jurisdiction,<sup>1</sup> which courts are generally designated as circuit or district courts.<sup>2</sup> The power to issue the writ is said to be incident to superior courts.<sup>3</sup> Since the power of issuing this writ is by the common law lodged in the court, it has been denied to the judge during the vacation of the court.<sup>4</sup>

§ 214. In issuing writs of *mandamus* courts exercise original or appellate jurisdiction.—In issuing a writ of *mandamus* a court may be exercising its original jurisdic-

<sup>1</sup> Kendall v. United States, 12 Pet. 524; Chumasero v. Potts, 2 Mont. 242.

6 Fla. 279; Judd v. Driver, 1 Kans. 455.

<sup>2</sup> Nichols v. Comptroller, 4 Stew. & Port. 154; Henderson, Ex parte,

<sup>3</sup> State v. Todd, 4 Ohio, 351; Grier v. Shackelford, 3 Brev. 491.

<sup>4</sup> Grant, Ex parte, 6 Ala. 91. See Bean v. People, 6 Colo. 98.

tion, or it may be exercising its appellate or supervisory jurisdiction. When a writ of *mandamus* is issued to an officer it is an exercise of original jurisdiction; but its issuance to an inferior court is an exercise of appellate or supervisory jurisdiction.<sup>1</sup>

§ 215. **Issue of writs of mandamus by appellate courts.**—In many cases, where the highest appellate court can only issue the writ of *mandamus* in aid of its jurisdiction, it has refused to issue the writ except in cases which directly affected the exercise of its appellate powers.<sup>2</sup> Other courts, which were given a general superintending and supervisory control over inferior courts, have claimed a right to issue a *mandamus* to such courts as broad as the exigency of the case.<sup>3</sup> When both the appellate and the inferior courts have original jurisdiction in *mandamus* proceedings, the appellate courts, owing to their crowded dockets, will compel litigants in the first instance to apply for the writ to the inferior courts, unless in a case of far more than ordinary magnitude and importance.<sup>4</sup>

§ 216. **Issue of mandamus by the United States supreme court.**—The United States supreme court, except in a few cases which seldom occur, has by the provisions of the United States constitution only appellate jurisdiction, and it is not in the power of congress to confer original

<sup>1</sup> Crane, Ex parte, 5 Pet. 190; People v. Bacon, 18 Mich. 247; Tawas, etc. R. R. v. Iosco Cir. Judge, 44 Mich. 479.

<sup>2</sup> State v. Judge Fourth Dist., 17 La. An. 282; State v. Elmore, 6 Cold. 528; State v. Biddle, 36 Ind. 138; Whitfield v. Greer, 3 Baxt. 78; Ing v. Davey, 2 Lea, 276; Grigsby v. Bowles, 79 Tex. 138; Daniel v. Warren Co. Court, 1 Bibb, 496; Westbrook v. Wicks, 36 Iowa, 382. The writ has been refused to compel the court to proceed to try a cause whereas such action would seem to warrant its issue, since without a

trial in the lower court the higher court cannot exercise its appellate jurisdiction. State v. Hall, 6 Baxt. 3; King v. Hampton, 3 Hayw. 59. A *mandamus* to sign a bill of exceptions is considered to be an exercise of appellate jurisdiction. State v. Hall, 3 Cold. 255.

<sup>3</sup> State v. Philips, 97 Mo. 331; McCreary v. Rogers, 35 Ark. 298.

<sup>4</sup> State v. Cooper Co. Court, 64 Mo. 170; State v. Breese, 15 Kans. 123; State v. Juneau Co. (Sup'rs), 38 Wis. 554; McBride v. Grand Rapids (Com. Council), 32 Mich. 360.

jurisdiction on it; consequently that court cannot ordinarily issue an original writ of *mandamus*.<sup>1</sup> Such writs when issued must be in aid of its appellate jurisdiction. Where a circuit court dismisses an appeal from the district court, erroneously supposing it has no jurisdiction, a *mandamus* will go to the circuit court to hear and decide the case, provided the amount involved will permit an appeal to the supreme court, for every suitor has a right in a proper case to the judgment of the supreme court.<sup>2</sup> If, however, the suit can in no case be taken to the supreme court, because the amount involved is not sufficient for its appellate jurisdiction, that court will issue no *mandamus* relative to it, since it will not be in aid of its appellate jurisdiction;<sup>3</sup> nor will it issue the writ in other cases, when it is not necessary for the exercise of its appellate jurisdiction.<sup>4</sup> A *mandamus* was asked from the federal supreme court to compel a state supreme court to revoke its order disbarring an attorney. It was held that that court could only issue that writ, except in a few cases where it had by the constitution original jurisdiction, as an exercise of its appellate jurisdiction or in aid of its appellate jurisdiction. In the case specified the writ could not be an exercise of appellate jurisdiction, because the act of 1789, and also section 688, Revised Statutes, only authorized the court to issue the writ to courts appointed by, or to persons holding office under the authority of, the United States; nor could such issue be claimed to be in aid of any appellate jurisdiction. The application for the writ was denied.<sup>5</sup> This court has, however, decided that it can issue a *mandamus* to an inferior federal court to restore to practice an attorney who has been improperly suspended or disbarred.<sup>6</sup> In this case, where

<sup>1</sup>Marbury v. Madison, 1 Cranch, 137; United States v. Black, 128 U. S. 40; Riggs v. Johnson Co., 6 Wall. 166.

<sup>2</sup>Insurance Co. v. Comstock, 16 Wall. 258; Bradstreet, Ex parte, 7 Pet. 634.

<sup>3</sup>Burdett, In re, 127 U. S. 771; Newman, Ex parte, 81 U. S. 152.

<sup>4</sup>Hoyt, Ex parte, 13 Pet. 279.

<sup>5</sup>Green, In re, 141 U. S. 325; 12 Sup. Ct. R. 114.

<sup>6</sup>Bradley, Ex parte, 7 Wall. 364.

this matter was fully considered the court decided that an order disbarring an attorney is not reviewable by a writ of error, it not being a judgment in the sense of the law for which that writ will lie. Yet the court granted the writ, relying on certain former decisions. Those decisions relate to signing a bill of exceptions,<sup>1</sup> and reinstating and trying causes improperly dismissed for supposed lack of jurisdiction;<sup>2</sup> to signing the record of a judgment rendered in a case by the preceding judge;<sup>3</sup> to allowing an appeal and compelling the production of the transcript,<sup>4</sup> and to enforce a decree against which a *supersedeas* had been erroneously allowed, pending an appeal on a bond, which was not sufficient in amount to authorize a *supersedeas*.<sup>5</sup> In those cases it might be held that the writ could properly issue in aid of the appellate jurisdiction of the court, but in a disbarment proceeding there is no question of appellate jurisdiction, and the court expressly says that in such cases no writ of error will lie. Though the issue of the writ in a disbarment proceeding called forth a dissenting opinion, yet the necessity for the writ in such cases will probably cause the ruling to be sustained in the future, though it be illogical.<sup>6</sup> The new circuit courts of appeal, lately created by act of congress, can have no greater authority to issue the writ of *mandamus* than the supreme court of the United States, since they are merely authorized to assume the jurisdiction of the latter court in certain cases, thereby relieving the latter court of much of the overwhelming business pressing on it.

**§ 217. Issue of writs of mandamus by subordinate federal courts.**—The jurisdiction of the United States courts,

<sup>1</sup> Crane, Ex parte, 5 Pet. 190. .

<sup>2</sup> Bradstreet, Ex parte, 7 Pet. 634.

<sup>3</sup> Life, etc. Co. v. Wilson, 8 Pet. 291.

<sup>4</sup> United States v. Gomez, 3 Wall. 752.

<sup>5</sup> Stafford v. Union Bank, 17 How. 275.

<sup>6</sup> The earlier decisions on this ques-

tion are: Burr, Ex parte, 9 Wheat. 529; Secombe, Ex parte, 19 How. 9. Another court which could only issue the writ of *mandamus* in aid of its appellate jurisdiction decided that it had no power to issue a writ of *mandamus* to restore an attorney who had been disbarred. Walls v. Palmer, 64 Ind. 493.

except the supreme court within the limits fixed by the constitution of the United States, is determined by act of congress. The federal circuit courts in the various states are not authorized to issue a *mandamus* in original proceedings. Congress has not yet granted them that authority, though it has the power to do so.<sup>1</sup> They can issue writs of *mandamus* only in aid of a jurisdiction already acquired.<sup>2</sup> On account of the absence of the power to issue an original writ of *mandamus*, and as not involving a jurisdiction already acquired, applications therefor to the federal circuit courts have been refused: to compel the register of a federal land-office to issue a certificate of the purchase of certain land;<sup>3</sup> to compel a district court to vacate a rule allowing certain amendments to the record;<sup>4</sup> to order state taxing officers to levy a tax to pay certain bonds;<sup>5</sup> to compel the auditor of a state to issue a certificate in order to recover certain taxes improperly paid;<sup>6</sup> and to compel a postmaster to receive and transmit through the mails a certain publication as second and not third class matter, though the circuit court is given express jurisdiction of all cases arising under the postal laws.<sup>7</sup> The circuit court can issue the writ of *mandamus* to district courts only when necessary for the exercise of their own jurisdiction, as to compel the rendition of a judgment or decree.<sup>8</sup> The only court excepted from this limited jurisdiction is the circuit court of the District of Columbia, which is now the supreme court of the District of Columbia;<sup>9</sup> also by act of March 3,

<sup>1</sup> Kendall v. United States, 12 Pet. 524; Riggs v. Johnson Co., 6 Wall. 166; American, etc. Co. v. Bell, etc. Co., 1 McCrary, 175; McIntire v. Wood, 7 Cranch, 504.

<sup>2</sup> Rosenbaum v. Bauer, 120 U. S. 450; Davenport v. Dodge (County), 105 U. S. 237; Labette Co. Com'rs v. United States, 112 U. S. 217.

<sup>3</sup> McIntire v. Wood, 7 Cranch, 504.

<sup>4</sup> Smith v. Jackson, 1 Paine, 453.

<sup>5</sup> Greene (County) v. Daniel, 102

U. S. 187; Davenport v. Dodge (County), 105 U. S. 237; Bath Co. v. Amy, 13 Wall. 244.

<sup>6</sup> Graham v. Norton, 15 Wall. 427.

<sup>7</sup> United States v. Pearson, 32 Fed. Rep. 309.

<sup>8</sup> Smith v. Jackson, 1 Paine, 453.

<sup>9</sup> United States v. Kendall, 12 Pet. 524; Riggs v. Johnson Co., 6 Wall. 166; Weber v. Lee Co., 6 Wall. 210; United States v. Black, 128 U. S. 40.

1873, the federal circuit courts are given jurisdiction by *mandamus* to compel the Union Pacific Railroad Company to operate its road as required by law.<sup>1</sup>

§ 218. **Mandamus by federal courts to levy a tax to pay their judgments.**— When a judgment has been obtained in a federal circuit court against a municipality, a *mandamus* may be issued by such court to compel the municipal authorities to levy and collect a tax to pay such judgment. The issue of a *mandamus* in such case is simply a mode of executing the judgment, and not an original proceeding.<sup>2</sup> It is a proceeding ancillary to the judgment, and a substitute for the ordinary process of execution, which is generally not allowed to run against municipal corporations.<sup>3</sup> But since the writ of *mandamus* creates no new rights or duties, the municipal officers can only be required to perform such duties as the state laws impose on them.<sup>4</sup> If they return that they have already levied all the tax the law allows them to do, such return is a sufficient answer to the writ.<sup>5</sup> Any limitation on the power of the municipal officers to levy a tax should be urged in the suit on the bonds before a judgment thereon is obtained, and not in the proceedings to compel the levy of a tax to pay the judgment.<sup>6</sup> Where, however, the relator must go behind his judgment to show the remedy pertaining to the bonds relative to the power to tax for their payment, the court cannot decline to take cognizance of the fact that the bonds are utterly void, and that no such remedy exists for their payment.<sup>7</sup> The

<sup>1</sup> United States v. Union Pacific R. R., 2 Dill. 527.

<sup>2</sup> Memphis (Merchants) v. Memphis (City), 9 Baxt. 76; Greene (County) v. Daniel, 102 U. S. 187; Davenport v. Dodge (County), 105 U. S. 237.

<sup>3</sup> Riggs v. Johnson County, 6 Wall. 166; Weber v. Lee County, 6 Wall. 210; Walkley v. Muscatine (City), 6 Wall. 481; United States v. Oswego (Town), 28 Fed. Rep. 55. The *mandamus* is not required to be against

the municipality, but it may issue against the officers whose duty it is to levy the tax. Labette County (Com'rs) v. United States, 112 U. S. 217. See § 237.

<sup>4</sup> Graham v. Parham, 32 Ark. 676.

<sup>5</sup> Supervisors v. United States, 18 Wall. 71.

<sup>6</sup> United States v. New Orleans, 98 U. S. 381.

<sup>7</sup> Brownsville v. Loague, 129 U. S. 493.

court must use the agencies established by law for the imposition and collection of such taxes, and therefore cannot appoint its marshal to do so, unless the law authorizes such action.<sup>1</sup> Jurisdiction of a court is not exhausted by the obtaining of a judgment, but continues till the judgment is satisfied, while the federal courts are supreme in their sphere; consequently any attempts in the state courts to prevent the collection of a tax ordered by a federal court to pay a judgment obtained therein, as by enjoining the officers from levying the tax,<sup>2</sup> or by reversing on *certiorari* the order of the proper authority levying the tax,<sup>3</sup> will be disregarded, and the proper officers will be compelled to levy and collect the tax.

<sup>1</sup> *Rees v. Watertown (City)*, 19 (Sup'rs), 2 Biss. 77; *Mayor v. Lord*, Wall. 107; *Barkley v. Levee Commissioners*, 93 U. S. 258. These decisions overrule *Welch v. St. Genevieve*, 1 Dill. 130, and *Lansing v. City Treasurer*, 1 Dill. 523.

(Sup'rs), 2 Biss. 77; *Mayor v. Lord*, 9 Wall. 409; *Riggs v. Johnson Co.*, 6 Wall. 166; *Weber v. Lee Co.*, 6 Wall. 210.

<sup>3</sup> *United States v. Silverman*, 4 Dill. 224.

<sup>2</sup> *United States v. Lee County*

## CHAPTER 16.

### RELATIONS BETWEEN FEDERAL AND STATE COURTS AND OFFICERS, RELATIVE TO THE USE OF THE WRIT OF *MANDAMUS*.

§ 219. Federal courts can issue a *mandamus* to all state officers, except judicial officers, but state courts cannot to federal officers.

220. *Mandamus* in connection with the transfer of causes from the state to the federal courts.

§ 219. Federal courts can issue a *mandamus* to all state officers, except judicial officers, but state courts cannot to federal officers.—Owing to the peculiar relations between the United States government and the states, questions have often arisen concerning the right of the federal courts to issue the writ of *mandamus* to state courts and state officers, and of state courts to issue the writ to federal courts and federal officers. The laws of the United States are the supreme law of the land, and the states have no control over the federal officers, who can only be controlled by the power that created them; consequently a state court cannot issue a *mandamus* to a federal officer.<sup>1</sup> Nor can the states restrain either the process or the proceedings of the national courts.<sup>2</sup> The United States courts are invested with authority to decide causes in the same manner as the state courts are, and involving the rights and remedies of parties under state laws, and are allowed to use the same remedies as the state courts. They can therefore issue the writ of *mandamus* to state officers, so far as the federal congress has given them authority. They can issue the writ of *mandamus* to all state officers except

<sup>1</sup> McClung v. Silliman, 6 Wheat.      <sup>2</sup> Riggs v. Johnson Co., 6 Wall. 598; Ladd v. Tudor, 3 W. & M. 325; 166; United States v. Lee Co. Kendall v. United States, 12 Pet. (Sup'rs), 2 Biss. 77.



judicial officers.<sup>1</sup> The United States, owing to the complete independence of the states, can impose on a state officer, as such, no duty whatever and compel him to perform it.<sup>2</sup> The state courts, being courts of general jurisdiction, may by *mandamus* require state courts or officers to discharge any duty whatever incumbent on them. They have required local officers to levy taxes to pay judgments obtained in the federal courts<sup>3</sup> to pay to the judgment-creditor money collected on a tax levied to pay his judgment, though such judgment was obtained in a federal court,<sup>4</sup> and to erase certain mortgages then on file in the recorder's office, in accordance with an order of a national district court, sitting in bankruptcy.<sup>5</sup> A *mandamus* will not lie to a state judge to issue a subpoena requiring parties to appear and testify before the register and receiver of a federal land office. It would be an intrusion.<sup>6</sup>

**§ 220. Mandamus in connection with the transfer of causes from the state to the federal courts.**—Congress has provided by its legislation that certain suits filed in the state courts may under certain circumstances be transferred to the federal courts, and that if such suits be wrongfully transferred to the federal courts, those courts shall remand them to the state courts for trial. In case either court shall fail in its duty, the question arises whether such duty is ministerial and subject to be enforced by the writ of *mandamus*. It is generally held that such duties are partly judicial, and that an appellate state court will not issue a *mandamus* to compel an inferior state court to transfer a cause to a federal court.<sup>7</sup> The proper remedy is to appeal

<sup>1</sup> *Riggs v. Johnson Co.*, 6 Wall. 166.

<sup>2</sup> *Kentucky v. Denison*, 65 U. S. 66.

<sup>3</sup> *State v. Beloit*, 20 Wis. 79.

<sup>4</sup> *Brown v. Crego*, 32 Iowa, 498.

<sup>5</sup> *Conrad v. Prieur*, 5 Rob. 49; *Diggs v. Prieur*, 11 Rob. 54; *Benjamin v. Prieur*, 8 Rob. 193.

<sup>6</sup> *Boom v. De Haven*, 72 Cal. 280.

<sup>7</sup> *State v. Curler*, 4 Nev. 445; *People v. Jackson* Cir. Court (Judge), 21 Mich. 577; *Campbell v. Wallen*, Mart. & Yerg. 266; *Francisco v. Manhattan I. Co.*, 36 Cal. 283; *Hough v. Western T. Co.*, 1 Biss. 425; *Orosco v. Gagliardo*, 22 Cal. 83; *Cromie, In re*, 2 Biss. 160; *Gordon v. Longest*, 16 Pet. 97. *Contra*, *Brown v. Crippen*, 4 Hen. & M.

from the final judgment to the state supreme court, and thence take a writ of error, if necessary, to the federal supreme court.<sup>1</sup> To the United States circuit courts has not been given the power to issue a *mandamus* to compel such transfer.<sup>2</sup> When a transfer has been granted to the federal court, a *mandamus* to the state court to proceed and try the case will be refused, because in making such transfer the court acted in a judicial capacity.<sup>3</sup> It has, however, been held that an appeal may be taken from the order transferring the case, and that a *mandamus* may issue to compel the allowance of such appeal.<sup>4</sup> An original *mandamus* proceeding cannot be transferred from a state to a federal court. It was held by a divided court that the circuit court was limited by statute to the issue of writs of *mandamus* in aid of a jurisdiction already acquired, and that the removal acts did not extend to *mandamus* proceedings, which were not civil actions in the sense in which those words were used in that statute.<sup>5</sup> When a transfer to the federal court has been refused, but the defendant has filed the papers in the federal court, a *mandamus* will issue to compel the state court, upon its refusal, to proceed with the case, though the answer shows that a nonsuit was entered in the federal court against the plaintiff, and an injunction issued against his prosecuting a petition for a *mandamus*. Courts of last resort cannot be deprived of their power, to control the inferior state courts in the discharge of their duties, by the federal courts by injunction or other process against liti-

173; *State v. Fairfield C. Pleas*, 15 Ohio St. 377. The last court holds that a *mandamus* to transfer the cause, after the rendition of a judgment, is not proper, but that a writ of error is then appropriate. *Shelby v. Hoffman*, 7 Ohio St. 450.

<sup>1</sup> *Hough v. Western T. Co.*, 1 Biss. 425; *Cromie, In re*, 2 Biss. 160; *Gordon v. Longest*, 16 Pet. 97; *Francisco v. Manhattan I. Co.*, 36

Cal. 283; *State v. Combination, etc. Co.*, 4 Nev. 445.

<sup>2</sup> *Hough v. Western T. Co.*, 1 Biss. 425; *Cromie, In re*, 2 Biss. 160. *Contra*, *Spraggins v. Humphries Co. Court, Cooke*, 160.

<sup>3</sup> *Francisco v. Manhattan I. Co.*, 36 Cal. 283.

<sup>4</sup> *State v. Judge Thirteenth Dist.*, 23 La. An. 29.

<sup>5</sup> *Rosenbaum v. Bauer*, 120 U. S. 450.

gants.<sup>1</sup> A *mandamus* will not lie to compel a federal circuit court to remand a case claimed to have been erroneously transferred to it. In such case the remedy is by appeal or writ of error, if the amount involved is not too small for an appeal or writ of error. If the amount involved is too small to allow an appeal or writ of error, the judgment of the federal circuit court is final.<sup>2</sup> Where a federal court remanded a case to the state court, since it was not a final judgment from which error would lie, a *mandamus* was allowed to compel the federal court to proceed with the case;<sup>3</sup> but under the act of 1887 it has been decided that a *mandamus* will not lie in such a case,<sup>4</sup> the intention of the law being that the remand should in no way be disturbed.

<sup>1</sup> White v. Holt, 20 W. Va. 792.

<sup>4</sup> Pennsylvania Co., Ex parte, 137

<sup>2</sup> Hoad, Ex parte, 105 U. S. 578. U. S. 451.

<sup>3</sup> Railroad v. Wiswall, 23 Wall.  
507.

## CHAPTER 17.

### APPLICATION TO OFFICER TO PERFORM HIS DUTY.

- § 221. *Mandamus* is never issued unless the respondent is in default in the performance of his duty.
222. A demand must be made before the writ will issue.
223. A refusal to comply must be shown before the writ will issue.
224. When personal demand is unnecessary.
225. A positive refusal to perform the duty is not always necessary — Conduct may be equivalent to a refusal.
226. A demand cannot be made before the time has expired wherein the officer is allowed to do the act.
227. Will a *mandamus* lie when the power to do the act for that year ceases with the occurrence of the default?

§ 221. **Mandamus is never issued unless the respondent is in default in the performance of his duty.**— Since the law presumes that every one will do his duty, this extraordinary writ will not issue till the party sought to be constrained has failed to do his duty. It will not be issued in anticipation of such failure, but he must be in actual default.<sup>1</sup> It is immaterial how strong the presumption may be that the party at the proper time will refuse to perform his duty. No threats or previous determination not to perform his duty will take the place of an actual default.<sup>2</sup> When a judge, in continuing a criminal case, stated that the prisoner was not entitled to a jury and should be tried without one, the writ was refused because he was not in default, the case not having been tried.<sup>3</sup> In one case, to prevent delay and because the question was new, a special rule was granted

<sup>1</sup> *McConihe v. State*, 17 Fla. 238; *Fla.* 263; *Condit v. Newton Co.*, 25 Cutting, Ex parte, 94 U. S. 14; *State Ind.* 422.

*v. Gracey*, 11 Nev. 223; *State v. Rising*, 15 Nev. 164; *Public Schools (Com'rs) v. County Com'rs*, 20 Md. 449; *Lake Co. (Com'rs) v. State*, 24

<sup>2</sup> *State v. Jefferson Co. (Com'rs)*, 17 Fla. 707; *State v. Carney*, 3 Kans. 88; *People v. Dowling*, 55 Barb. 197,

<sup>3</sup> *State v. Rising*, 15 Nev. 164.

that, in case the judges below should refuse to grant the judgment asked, then at the next term of court they should show cause why a *mandamus* should not issue to them to proceed to judgment. The court admitted that, strictly speaking, the relators were not entitled to the rule till after a default on the part of the respondents in the discharge of their duties.<sup>1</sup>

✓ § 222. **A demand must be made before the writ will issue.**—A demand must be made on the proper officer to perform the duty desired before a writ of *mandamus* will be issued to compel him to discharge such duty.<sup>2</sup> It would be an abuse of justice to convict one of non-feasance or misdemeanor in neglecting his official duty, when he has not refused to do what may be required, and to mulct him in costs when he is not in default.<sup>3</sup> This writ only issues as a matter of necessity and when there is no other means of obtaining the discharge of the duty incumbent on the officer. Consequently this writ will not be issued to compel an officer to do an act which he has not been asked to do.<sup>4</sup> The demand should be for the specific thing which ought to be done, untrammelled by any condition which may make the refusal qualified instead of absolute.<sup>5</sup>

✓ § 223. **A refusal to comply must be shown before the writ will issue.**—As a corollary of the statement in the prior section that a demand must first be made, it should be added that a refusal to comply with the demand must also be shown.<sup>6</sup> A *mandamus* to make a county subscribe

<sup>1</sup> Fish v. Weatherwax, 2 John. Cas. 215.

<sup>3</sup> State v. Gibbs, 13 Fla. 55.

<sup>4</sup> People v. Hyde Park, 117 Ill.

<sup>2</sup> State v. Davis, 17 Minn. 429; State v. Schaack, 28 Minn. 358;

462; Le Roux v. Judge, 45 Mich. 416.

Kemerer v. State, 7 Neb. 130; Monroe Co. v. Lee Co., 36 Ark. 378;

<sup>5</sup> Macoupin Co. Court v. People, 58 Ill. 191.

Com. v. Pittsburgh, 34 Pa. St. 496; Talcott v. Harbor Com'rs, 53 Cal. 199; United States v. Elizabeth (City), 42 Fed. Rep. 45; Hardee v. Gibbs, 50 Miss. 802; Q. v. Ambergate, etc. R. R., 17 Ad. & E. (N. S.) 362,

<sup>6</sup> Com. v. Pittsburgh, 34 Pa. St. 496; United States v. Boutwell, 17 Wall. 607; State v. Governor, 25 N. J. L. 331; Lewis v. Henley, 2 Ind. 332; Bryson v. Spaulding, 20 Kans. 427.

for stock of a railroad company, as provided by law, was refused for failure of the company to produce its subscription books and ask the county to subscribe.<sup>1</sup> Nothing short of an absolute refusal of a judge to sign a bill of exceptions will authorize the issuance of a *mandamus* to compel him to sign it.<sup>2</sup> Where it is not clear that there has been a refusal, the writ will be denied. A corporator requested the privilege of inspecting the corporate books. The managing committee asked time to consider the request. This was not considered to be a sufficient refusal to warrant a *mandamus*.<sup>3</sup> A county judge was asked to sign and seal a case for appeal. He made a suggestion on the subject and the applicant went off. This was no absolute refusal and did not justify a *mandamus*. The applicant should have declined the suggestion and insisted that he wanted the case, as there stated, signed and sealed.<sup>4</sup>

§ 224. **When personal demand is unnecessary.**—When it is said that a demand to do the act and a refusal thereof must exist prior to an application for a *mandamus* to compel the performance of the act desired, it must not be considered that such demand must in all cases be personal, or that such refusal must always be of the same nature. When the duty sought to be enforced is of a private nature, affecting only the right of the relator, a personal demand is necessary;<sup>5</sup> and it is also necessary, if the duty sought to be enforced is of such a character that it could not be expected to be performed till demanded.<sup>6</sup> Decisions, that there must be an express and distinct demand or request to perform,<sup>7</sup> must be confined to such cases. Where, however, the duty is of a purely public nature, wherein no in-

<sup>1</sup> Oroville, etc. R. R. v. Plumas Co., 37 Cal. 354.

<sup>2</sup> State v. Redd, 68 Mo. 106.

<sup>3</sup> King v. Wilts, etc. Navigation (Prop'rs), 3 Ad. & E. 477.

<sup>4</sup> Irving v. Askew, 20 L. T. R. (N. S.) 584.

<sup>5</sup> People v. Education Board, 127 Ill. 613; People v. Mount Morris

(Town) (Ill., May 11, 1891), 27 N. E. Rep. 757; Ingerman v. State (Ind., May 1, 1891), 27 N. E. Rep. 499.

<sup>6</sup> Humboldt Co. v. Churchill Co. (Com'rs), 6 Nev. 30.

<sup>7</sup> United States v. Boutwell, 17 Wall. 607; Price v. Riverside, etc. Co., 56 Cal. 431.

dividual right or duty is concerned, and where there is no one person upon whom either a right or duty devolves to make a demand of performance, an express demand or refusal is not necessary. The law does not require a useless thing. It points out the whole duty with time and place. It stands in place of a demand, and neglect or omission to perform in place of a refusal.<sup>1</sup> Since in such a case it is not necessary to make a demand, an allegation in the alternative *mandamus* that the demand was made and a denial thereof in the return do not raise an issue.<sup>2</sup> A demand was considered unnecessary: when the school board had excluded colored children from certain schools;<sup>3</sup> when the board of councilmen failed to order an election to fill a vacancy in their number;<sup>4</sup> when an execution against a municipal corporation was retained *nulla bona* and the municipality failed to levy a tax to pay it;<sup>5</sup> when the board of trustees of a corporation failed to call a meeting for the annual election of trustees;<sup>6</sup> when the police jury of a county failed for many months, after the site for a court-house had been properly selected, to levy a tax as required by law to pay for its construction;<sup>7</sup> when the city council failed to levy a tax as required by law to pay the interest and principal of the bond upon which the relator had obtained judgment.<sup>8</sup>

<sup>1</sup> *State v. Bailey*, 7 Iowa, 390; *People v. Education Board*, 127 Ill. 613; *State v. Rahway*, 33 N. J. L. 110; *Com. v. Allegheny Co. (Com'rs)*, 37 Pa. St. 237; *State v. Marshall Co. (Judge)*, 7 Iowa, 186; *Chumasero v. Potts*, 2 Mont. 242; *State v. Weld*, 39 Minn. 426; *Fisher v. Charleston (City)*, 17 W. Va. 595; *Fisher v. Charleston (Mayor)*, 17 W. Va. 628; *Humboldt Co. v. Churchill Co. (Com'rs)*, 6 Nev. 30; *Lee Co. v. State*, 36 Ark. 276; *People v. Mount Morris (Town)* (Ill., May 11, 1891), 27 N. E. Rep. 757; *State v. Wright*, 10 Nev. 167; *Smith v. Lawrence* (S. Dak., June 19, 1891), 49 N. W. Rep. 7; *State v. Racine (City Council)*, 22 Wis. 258; *Columbia Co. (Com'rs) v. King*, 13 Fla. 451.

<sup>2</sup> *Lyman v. Martin*, 2 Utah, 136.

<sup>3</sup> *People v. Education Board*, 127 Ill. 613.

<sup>4</sup> *State v. Rahway*, 33 N. J. L. 110.

<sup>5</sup> *State v. Slavens*, 75 Mo. 508; *Fisher v. Charleston (City)*, 17 W. Va. 595; *Fisher v. Charleston (Mayor)*, 17 W. Va. 628.

<sup>6</sup> *State v. Wright*, 10 Nev. 167.

<sup>7</sup> *Watts v. Carroll (Police Jury)*, 11 La. An. 141.

<sup>8</sup> *State v. Racine (Com. Council)*, 22 Wis. 258.

Where, however, the proper mode of performance of the duty is doubtful, a demand specifying the proper mode will be required before the *mandamus* will be granted. When a *mandamus* is asked by a private party to compel a public officer to keep his books in a certain way in order to conform to the statute, he must have requested the officer to do so before he asks for a *mandamus*, because there are often differences of opinion as to the construction of a statute, and the officer should have an opportunity to act on the relator's construction before being involved in litigation.<sup>1</sup>

**§ 225. A positive refusal to perform the duty is not always necessary — Conduct may be equivalent to a refusal.**— A positive refusal is also not necessary in all cases before a writ of *mandamus* will lie to compel the performance of a duty. The law never demands a vain thing, and when the conduct and action of the officer is equivalent to a refusal to perform the duty desired, it is not necessary to go through the useless formality of demanding its performance. Anything showing that the defendant does not intend to perform the duty is sufficient to warrant the issue of a *mandamus*.<sup>2</sup> Proof of a refusal by a municipality to levy a tax to pay the interest on its bonds was considered to be unnecessary, when it had countermanded an assessment therefor, and in its return to the alternative writ justified such action;<sup>3</sup> it was also considered to be unnecessary when it failed to make any provision for such payment.<sup>4</sup> A demand or refusal to receive the relators as members of the board was not necessary to obtain a writ of *mandamus* to receive them as such, after the passage by the board of a resolution declaring the election to be void and allowing the sitting members to retain their seats till

<sup>1</sup> State v. Eberhardt, 14 Neb. 201.

<sup>2</sup> Com. v. Pittsburgh, 34 Pa. St. 496.

<sup>3</sup> Com. v. Allegheny (Com'rs), 37 Pa. St. 277.

<sup>4</sup> State v. Clinton Co. (Com'rs), 6 Ohio St. 280; Com. v. Pittsburgh (Select Coun.), 34 Pa. St. 496; Columbia Co. (Com'rs) v. King, 13 Fla. 451.



the courts passed on the matter.<sup>1</sup> A failure to perform a duty imposed on an officer on the proper day, without even the pretense of a reason therefor, is equivalent to a refusal, and a *mandamus* may be properly awarded to compel its performance.<sup>2</sup> A failure for twelve years to perform the peremptory duty of providing a house of correction distinct from the common gaol authorizes a *mandamus* to provide the proper building.<sup>3</sup> When a board of supervisors allow their session to expire without acting on a claim presented to them for allowance, a *mandamus* will lie to compel them to audit it, since such action relative to *mandamus* proceedings must be regarded as a rejection of the claim.<sup>4</sup> Where a vestry was called upon to lay a tax rate for the support of churches, but adjourned from time to time without acting in the matter, evidently with a view to avoid laying the rate, such action was considered for *mandamus* proceedings to be equivalent to a refusal.<sup>5</sup> Where a judgment had been recovered against a town, and its record showed clearly an intention not to levy a tax to pay it, a demand to levy a tax for that purpose was considered unnecessary.<sup>6</sup> Where the directors of a corporation, whose charter required an annual election of its directors, postponed the election for six months, it was considered that such action was an open and public declaration of their determination not to perform a plain duty, and it was unnecessary, before applying for a *mandamus*, to make a demand on them to appoint judges and tellers for such election.<sup>7</sup> Where a city council was by law required to levy a tax annually sufficient to pay off the interest on certain bonds issued by the city, a failure of the city council to make a levy, though requested to do so, was equivalent to a refusal.<sup>8</sup>

<sup>1</sup> State v. Hudson Co. (Freeholders), 35 N. J. L. 269.

<sup>2</sup> Knox Co. (Board Com'rs) v. Aspinwall, 24 How. 376.

<sup>3</sup> Com. v. Hampden (Just.), 2 Pick. 414.

<sup>4</sup> People v. Richmond Co. (Sup'rs), 20 N. Y. 252.

<sup>5</sup> Q. v. St. Margaret's Vestry, 8 A. & E. 889.

<sup>6</sup> Palmer v. Stacy, 44 Iowa, 340.

<sup>7</sup> Mottu v. Primrose, 23 Md. 482.

<sup>8</sup> Maddox v. Graham, 2 Metc. (Ky.) 56.

So the refusal of a board of supervisors by resolution to levy a tax to pay a demand allowed by them, till the owner thereof had complied with certain conditions, which they illegally imposed, was equivalent to a refusal to levy the tax.<sup>1</sup> Where a series of judgments has been rendered against a town, and for a number of years the town has taken no action to provide for their payment, a *mandamus* will lie to compel the levy of a tax to pay such a judgment, though no formal demand to do so has been made. Such town has shown by its conduct that it does not intend to pay, and it would be a work of supererogation to require a demand.<sup>2</sup> Where, by law, on request of a contractor, a public board was required to agree with him on arbitrators to pass on his claims, a failure by such board to act on the matter, though the contractor had attended their meetings and requested them to act, was considered to be equivalent to a refusal to act.<sup>3</sup> A rescission of the resolution, on which a dispatch was founded, was considered for the purposes of a *mandamus* to be equivalent to a refusal to send the dispatch.<sup>4</sup> A demand on a city to pay a judgment against it was held to justify an application to compel it to levy a tax to make such payment upon its failure to pay, and that a demand to levy a tax was unnecessary.<sup>5</sup> Where a refusal is dispensed with, it must clearly appear that the respondent withholds compliance and distinctly determines not to do what is required,<sup>6</sup> or the *mandamus* will be refused. A demand was made May 24th on one member of a township committee to borrow money to pay a judgment against the township. A *mandamus* was applied for June 1st. The interval was considered to be too brief to support the conclusion that the committee had refused to meet and act.<sup>7</sup>

<sup>1</sup> *People v. Livingston Co. (Sup'rs)*, 68 N. Y. 114.

<sup>2</sup> *United States v. Brooklyn (Town)*, 10 Biss. 466.

<sup>3</sup> *State v. Jersey City (Board Finance)*, 38 N. J. L. 259.

<sup>4</sup> *King v. East India Co.*, 4 B. & Ad. 530.

<sup>5</sup> *Cairo (City) v. Everett*, 107 Ill. 75.

<sup>6</sup> *King v. Brecknock Canal*, 3 A. & E. 217.

<sup>7</sup> *State v. Union Township*, 42 N. J. L. 531.

It seems almost unnecessary to add that when a demand is not necessary a refusal is also not necessary.<sup>1</sup>

**§ 226. A demand cannot be made before the time has expired wherein the officer is allowed to do the act.—**

When by law an officer is allowed till a certain time to discharge a certain duty, no demand can be made on him till that period has passed. When it is the duty of a common council to provide in the annual appropriation bill for the payment of judgments against the city, the proper time to make a demand on them is after their failure to do so.<sup>2</sup> Where a statute requires a company after the work is completed, on requirement of an interested party, to perform those things which it has neglected, a demand thereof must be made after the completion of the work.<sup>3</sup> When the law, under which a debt is contracted by a county, prescribes that the tax for its payment shall be levied and collected at the same time and manner as the regular state and county taxes, a demand to make a levy of a tax to pay such debt is premature if made before such time.<sup>4</sup>

**§ 227. Will a mandamus lie, when the power to do the act for that year closes with the occurrence of the default?—**It sometimes happens that the officer is allowed to delay the performance of a duty till a certain date, and after that period it becomes impossible, owing to the nature of the duty or the provisions of law, for him to perform such duty. In such case it becomes a question whether a *mandamus* can issue at all, because prior to such date there has been no default, and subsequent thereto it is too late to comply with the law. A comptroller-general was required each year, on or before the 15th day of November, to notify the county auditors what per centum was to be levied on property as a tax to pay the interest on the state bonds then due, in arrear, and to become due during the coming year. The comptroller gave such notice,

<sup>1</sup> *Ante*, § 224.

<sup>3</sup> *Q. v. Bristol, etc. R. R.*, 4 Ad. &

<sup>2</sup> *Cairo (City) v. Campbell*, 116 Ill. E. (N. S.) 162.

305.

<sup>4</sup> *State v. Kennington*, 10 Rich. (N. S.) 299.

omitting from his calculation certain state bonds. A *mandamus* was applied for, after November 15th, to compel him to give a notice which would include such bonds. It was objected that the application was premature relative to the next year, and too late relative to the year just passed, inasmuch as the county auditors and the other county auditors had acted on such notices, and the law did not authorize any subsequent notice. The court considered such conclusion to be a parody on justice. It considered that, giving the statute and the rules of law a reasonable construction, a refusal by the respondent to perform this duty, even before November 15th, must be considered as equivalent to a total want of performance for all remedial purposes, inasmuch as the 15th day of November was fixed, not as the day proper for the doing of the act, but as a period to mark the default of the respondent should it remain unperformed, and therefore, as he might perform on a previous day, refusal on such day to perform altogether is evidence of a default as affecting the right of a party to a civil remedy. The court stated that, if the respondent in his return had denied the fact of refusal, or had alleged his willingness to perform, such allegation, if undisputed, would have ended the matter.<sup>1</sup> A city levied only a part of the tax required in order to pay certain obligations, and, when a *mandamus* was applied for to compel the levying of the necessary tax, it was objected that under the law the period wherein a tax could be levied had passed for that year. The court issued the alternative writ, stating that, in case a peremptory writ was eventually ordered, it would extend the time for making a return thereto, so as to cover the period wherein under the law the appropriation and the raising of the tax could be obtained.<sup>2</sup> The fact that a city had refused for one year to levy a tax to pay the interest on certain of its bonds, and the assertion in its return that it did not intend to levy the tax, was held to establish such a case

<sup>1</sup> Morton v. Compt. Gen., 4 Rich. (N. S.) 430.

<sup>2</sup> State v. Jersey City (Bd. Fin.) (N. J., Nov. 6, 1890), 20 Atl. Rep. 755.

of intended and certain default as justified the issuance of a writ of *mandamus* to compel the levy of such tax in advance of the time when the duty should in the current year be performed.<sup>1</sup> So where a municipal council passed an ordinance, that after a specified date no tolls should be collected on a certain ferry, which was contrary to the provisions of the law under which the ferry was purchased, a *mandamus* was issued before the specified date, compelling the city to continue to collect tolls.<sup>2</sup> The court cites several English decisions, wherein the writ was issued prior to actual default.<sup>3</sup>

<sup>1</sup> State v. New Orleans (City), 34 La. An. 477. E. & B. 228; Q. v. Great Western R. R., 1 E. & B. 253. These decisions

<sup>2</sup> Attorney-General v. Boston, 123 Mass. 460. are reversed upon appeal but on another point. The proposition is

<sup>3</sup> Q. v. York, etc. R. R., 1 E. & B. 178; Q. v. Lancashire, etc. R. R., 1 also inferentially sustained in Q. v. Eastern, etc. R. R., 10 A. & E. 531.

## CHAPTER 18.

### PARTIES TO MANDAMUS PROCEEDINGS.

- § 228. Parties in interest must be the relators in *mandamus* proceedings to protect private rights.
229. Can a private party be the relator to enforce a public right?
230. Subject continued.
231. Public officers, but not their agents, can apply for this writ as relators even against their co-officers.
232. Who may be joined as relators.
233. Does the writ abate by the death of the relator or the expiration of his term of office?
234. The writ must issue against him whose duty it is to do the act desired.
- 234a. All persons charged with the performance of the duty must be joined as respondents, but none others.
235. All persons concerned in the separate but co-operative steps in the attainment of the result sought may be joined as respondents in one *mandamus*.
236. Contrary rulings on the last proposition.
237. How the *mandamus* should be directed when a corporation is the respondent.
238. Does the writ abate upon the resignation, or expiration of the term of office, of the respondent?
239. When the resignation alone does not vacate the office, such resignation may be disregarded till the office is legally vacated.
240. Where a corporation or a select body is the respondent, no change in its membership will affect the proceedings.
241. *Mandamus* not lie to one having no duty in the premises or who has gone out of office.
242. Can third parties be subsequently brought in as relators or respondents?
- 242a. Subject continued.
243. Third persons interested should be allowed to intervene or should be made parties.
244. Third parties not allowed to intervene to litigate matters not involved in the *mandamus* proceedings.

§ 228. Parties in interest must be the relators in *mandamus* proceedings to protect private rights.—When a *mandamus* is applied for to enforce a private right the

party interested must be the relator,<sup>1</sup> or, where it is adjudged that under their statutes the writ no longer runs in the name of the state to protect private interests, contrary to the long-established usage,<sup>2</sup> such party must be the plaintiff.<sup>3</sup> To maintain his *mandamus* in such case the relator or plaintiff must show some personal or special interest in the matter,<sup>4</sup> and if the petition should fail to show such interest, it should be denied.<sup>5</sup> The proper party to apply for a *mandamus* to compel an officer to pay a warrant drawn on him is the holder of it, and not the party who drew it.<sup>6</sup> A county trustee is the proper relator in a *mandamus* to compel the state comptroller to divide the school funds and to pay them to the county trustees, and a petition filed by a county trustee to the use of a school-teacher is not maintainable.<sup>7</sup> When the board of supervisors of a county, acting as a board of equalization, reduce the assessed value of realty in a town, and the county auditor refuses to make the alteration, tax-payers who have not paid the tax may by *mandamus* compel the county auditor to make the alteration.<sup>8</sup> A father, however, since the duty devolves on him of sending his children to school, may be the relator in *mandamus* proceedings to assert their rights in the public schools; as to obtain admission for them to those schools,<sup>9</sup> or to be allowed to use certain books as textbooks in those schools.<sup>10</sup> All proceedings, however, by county

<sup>1</sup> State v. Weld, 39 Minn. 426; State v. Kearney (City), 25 Neb. Ottawa (City) v. People, 48 Ill. 233; 262; Board Liquid. v. McComb, 92 Pike Co. (Com'rs) v. People, 11 Ill. U. S. 531; State v. Crete (Mayor) (Neb., July 2, 1891), 49 N. W. Rep. 202.

<sup>2</sup> Chance v. Temple, 1 Iowa, 179; 272.

<sup>3</sup> State v. Jefferson Co. (Com'rs), 11 Morris v. Womble, 30 La. An. 1312. Iowa, 280.

<sup>4</sup> State v. Jefferson Co. (Com'rs), 11 Kans. 66; State v. Marston, 6 Kans. 524; People v. Pacheco, 29 Cal. 210; Myers v. State, 61 Miss. 138; Smith v. Lawrence (S. Dak., June 19, 1891), 49 N. W. Rep. 7; Stoddard v. Benton, 6 Colo. 508.

<sup>5</sup> State v. Davis Co. (Judge), 2 Iowa, 280.

<sup>6</sup> State v. Haben, 22 Wis. 660.

<sup>7</sup> Yost v. Gaines, 78 Tenn. 576.

<sup>8</sup> Ridley v. Doughty, 77 Iowa, 226.

<sup>9</sup> People v. Detroit (Bd. Educ.), 18 Mich. 400.

<sup>10</sup> State v. Columbus (Bd. Educ.), 35 Ohio St. 368.

<sup>4</sup> Wise v. Bigger, 79 Va. 269;

commissioners and the voters, in taking steps to raise money to take stock in an incorporated company, are between them, and the company has no control over the matter till the stock is taken. Prior thereto a petitioner or tax-payer can have a *mandamus* to compel the payment of the money, but the company cannot.<sup>1</sup>

§ 229. Can a private party be the relator to enforce a public right?—As to whether a private party may be a relator, when the duty whose performance is sought is of a public nature, is a question which has called forth many conflicting decisions. Some courts have decided that in such cases a private party cannot be the relator, unless he has some private or particular interest to be subserved, or some particular right to be pursued or protected, independent of that which he holds with the public at large.<sup>2</sup> In the absence of such special interest, they hold that the public officers must apply for the writ,<sup>3</sup> who of course can only apply to protect some public right or to secure some public interest.<sup>4</sup> It has been held, however, that the rule refusing the privilege to private parties of obtaining a *mandamus* to enforce public duties is one of discretion and not of law, and the court will ignore it when the attorney-general refuses to appear to complain of alleged omission of duty by public officers.<sup>5</sup> Parties who owned houses on certain streets

<sup>1</sup> Crawford Co. (Com'rs) v. Louisville, etc. Railroad, 39 Ind. 192.

<sup>2</sup> Sanger v. Kennebec Co. (Com'rs), 25 Me. 291; Lyon v. Rice, 41 Conn. 245; Atwood v. Partree, 56 Conn. 80; Peck v. Booth, 42 Conn. 271; Linden v. Alameda Co. (Sup'rs), 45 Cal. 6; Adkins v. Doolen, 23 Kan. 659; Bobbett v. State, 10 Kan. 9; Moon v. Cort, 43 Iowa, 503; Smith v. Saginaw (Mayor), 81 Mich. 123; People v. Inspectors State Prison, 4 Mich. 187; Heffner v. Com., 28 Pa. St. 108; Com. v. Mitchell, 82 Pa. St. 343; State v. Grubb, 85 Ind. 213; Mitchell v. Boardman, 79 Me. 469;

Weeks v. Smith, 81 Me. 538; State v. Hollinshead, 47 N. J. L. 439; Territory v. Cole, 3 Dak. 301.

<sup>3</sup> Bobbett v. State, 10 Kan. 9; Adkins v. Doolen, 23 Kan. 659; Sanger v. Kennebec Co. (Com'rs), 25 Me. 291; Territory v. Cole, 3 Dak. 301; Mitchell v. Boardman, 79 Me. 469; Weeks v. Smith, 81 Me. 538.

<sup>4</sup> People v. Rome, etc. R. R., 103 N. Y. 95; Attorney-General v. Albion, etc. Inst., 52 Wis. 469.

<sup>5</sup> People v. State Auditors (Board), 42 Mich. 422; People v. University (Regents), 4 Mich. 98.



have been allowed writs of *mandamus* to compel cities and towns to open and repair them, as being specially and directly interested in such action.<sup>1</sup> An elector was refused a *mandamus* to compel the county supervisors to order an election for the removal of the county seat.<sup>2</sup> A private person was not allowed to use the writ to compel public officers to remove fences and to open an old highway.<sup>3</sup> A private party was refused a *mandamus* to compel the opening of an alley, though it would have passed through two of his lots and would have enhanced the value of his property. It was considered that the only right he would have in the alley was a right of passage, which he would hold in common with the public.<sup>4</sup> A bidder for municipal work was denied a *mandamus* to compel the officers to award him the contract, though he was the lowest bidder. It was stated that the injury sustained by the rejection of the lowest bid fell on the public, and not on the relator, whose profits were speculative, of which the law would take no account.<sup>5</sup> Where a *mandamus* was brought, at the relation of a private party, to compel the county board of supervisors to build a bridge, the court sustained it, because the attorney-general signed the relator's brief and impliedly authorized the use of the name of the state.<sup>6</sup>

§ 230. **Subject continued.**— The great weight of American authority, however, is to the effect that, where the relief sought is a public matter, or a matter of public right, the people at large are the real party, and any citizen is entitled to a writ of *mandamus* to enforce the performance of such public duty.<sup>7</sup> Among such duties have been in-

<sup>1</sup> Hammar v. Covington (City), 3 36 Cal. 595; Stoddard v. Benton, 6 Metc. (Ky.) 494; Catlettsburg (Trustees) v. Kinner, 13 Bush, 334. <sup>7</sup> Chumasero v. Potts, 2 Mont. 242;

<sup>2</sup> Linden v. Alameda Co. (Sup'rs), 45 Cal. 6. State v. Gracey, 11 Nev. 223; State v. Francis, 95 Mo. 44; State v. Van

<sup>3</sup> Atwood v. Partree, 56 Conn. 80. Duyn, 24 Neb. 586; State v. Brown, 38 Ohio St. 344; State v. Ware, 13

<sup>4</sup> Heffner v. Com., 28 Pa. St. 108. Oreg. 380; Sansom v. Mercer, 68

<sup>5</sup> Com. v. Mitchell, 82 Pa. St. 343. Tex. 488; Wise v. Bigger, 79 Va.

<sup>6</sup> People v. San Francisco (Sup'rs),

cluded: the calling of an election to fill public or municipal offices;<sup>1</sup> the restoration of a highway to its former condition by a railroad company as required by its charter;<sup>2</sup> the running of its trains by a railroad company across a river to its legal terminus;<sup>3</sup> the opening<sup>4</sup> and working<sup>5</sup> of a public road; the direction by a city council to the city solicitor to proceed to sell according to law the lands of delinquents to enforce the payment of taxes;<sup>6</sup> the assessment by the assessor of property subject to assessment;<sup>7</sup> the selection of two newspapers of opposite politics wherein to publish the session acts;<sup>8</sup> the maintenance of a certain bridge as a public highway;<sup>9</sup> the maintaining, opening and closing of bridges over a certain river;<sup>10</sup> the widening of a street in a city;<sup>11</sup> the issuance by a county treasurer of his warrant for the collection of a tax;<sup>12</sup> the making out of the list of the stock of a railroad company for taxation by the auditor of the county on the failure of the company to do so;<sup>13</sup> and the issuance by a county auditor of his duplicate for the tax on the real estate in the county, without adding

289; *People v. Board Educ.*, 127 Ill. 613; *Ottawa (City) v. People*, 48 Ill. 233; *State v. Weld*, 39 Minn. 426; *Attorney-General v. Boston*, 123 Mass. 460; *State v. Marshall Co. (Judge)*, 7 Iowa, 186; *State v. Jefferson Co. (Canv'rs)*, 17 Fla. 707; *McConihe v. State*, 17 Fla. 238; *Union Pacific R. R. v. Hall*, 91 U. S. 343; *State v. Kearney (City)*, 25 Neb. 262; *People v. Collins*, 19 Wend. 56; *Ford v. Cartersville (Mayor)*, 84 Ga. 213; *Moses v. Kearney*, 31 Ark. 261; *Hancock v. Perry (Dist. Town)*, 78 Iowa, 550; *Clarke Co. (Com'rs) v. State*, 61 Ind. 75; *State v. Camden*, 39 N. J. L. 620; *Hyatt v. Allen*, 54 Cal. 353; *People v. Sullivan Co. (Sup'rs)*, 56 N. Y. 249; *Pumphrey v. Baltimore (Mayor)*, 47 Md. 145; *People v. Bloomington (Mayor)*, 63 Ill. 207.

<sup>1</sup> *McConihe v. State*, 17 Fla. 238; *State v. Brown*, 38 Ohio St. 344; *State v. Ware*, 13 Oreg. 381; *Sansom v. Mercer*, 68 Tex. 488.

<sup>2</sup> *State v. Hannibal, etc. R. R.*, 86 Mo. 13.

<sup>3</sup> *Union Pacific R. R. v. Hall*, 91 U. S. 343.

<sup>4</sup> *Hall v. People*, 57 Ill. 307.

<sup>5</sup> *People v. Collins*, 19 Wend. 56.

<sup>6</sup> *State v. Camden*, 39 N. J. L. 620.

<sup>7</sup> *Hyatt v. Allen*, 54 Cal. 353.

<sup>8</sup> *People v. Sullivan Co. (Sup'rs)*, 56 N. Y. 249.

<sup>9</sup> *Pumphrey v. Baltimore (Mayor)*, 47 Md. 145.

<sup>10</sup> *Ottawa (City) v. People*, 48 Ill. 233.

<sup>11</sup> *People v. Brooklyn (Com. Coun.)*, 22 Barb. 404.

<sup>12</sup> *People v. Halsey*, 37 N. Y. 344.

<sup>13</sup> *State v. Hamilton*, 5 Ind. 310.

to the valuation an additional per cent. which was added by a state board of equalization, which was not duly constituted.<sup>1</sup> The right of a private party to be the relator in a *mandamus* proceeding to compel the performance of a public duty does not exist, when such duty is due to the government as such. In such cases a private party cannot interfere, but the government through its officers alone can apply for the writ.<sup>2</sup> A creditor of a state was refused a writ of *mandamus*, when its effect would have been to exercise a supervisory control over the state treasurer and the auditor of state in the conduct of their offices. Such officers are liable to the state and not to its creditors, who cannot supervise the settlements made by those officers with the various tax collectors.<sup>3</sup> Of course, when the state as such is directly interested in the matter, it should apply through its legal officer, and a private party will not be allowed to enforce the rights of the state by this writ.<sup>4</sup>

**§ 231. Public officers, but not their agents, can apply for this writ as relators, even against their co-officers.** When the law imposes a power or duty upon a board of officers, and to do it they require the assistance of a *mandamus*, they may apply for it.<sup>5</sup> Agents or servants, however, cannot assert the rights of their principals and thereby obtain a *mandamus* in their own names. A committee of a town appointed to inspect the books of the overseers of the town cannot bring a writ of *mandamus* in their own names to compel such overseers to deliver to them such books for inspection. The committee are not public officers, entitled by their office to the custody of those books, nor charged with any public duty concerning them.<sup>6</sup> The rule, that a party cannot sue at law a partnership, board of trustees, or

<sup>1</sup> Hamilton v. State, 3 Ind. 452.

<sup>3</sup> State v. Dubuclet, 28 La. An. 85.

<sup>2</sup> Union Pacific R. R. v. Hall, 91 U. S. 343; State v. Weld, 39 Minn. 426; Attorney-General v. Boston, 123 Mass. 460; Chicago, etc. R. R. v. Suffern, 129 Ill. 274.

<sup>4</sup> State v. Carey (N. Dak., June 16, 1891), 49 N. W. Rep. 164.

<sup>5</sup> Holland v. State, 23 Fla. 123.

<sup>6</sup> Bates v. Overseers of Poor, 14 Gray, 163.

other board, of which he is a member, does not apply to *mandamus* proceedings.<sup>1</sup>

§ 232. **Who may be joined as relators.**—All the parties interested may be joined as relators in a *mandamus* proceeding,<sup>2</sup> but it is not necessary to join all of them.<sup>3</sup> If, however, other interested parties may be affected by the relief granted to the relator, the writ should be in behalf of all such interested parties, or should show that separate action can be taken on the relator's claim without injuring the other interested parties.<sup>4</sup> In order, however, that parties may be joined as relators, they must have a right common to all of them, must have a joint benefit in the performance of the act or duty required of the respondent, and must be joint sufferers, because of the non-doing.<sup>5</sup> A *mandamus* must not include more than one case, whether of the same or many individuals. Two or more distinct rights cannot be joined in one proceeding,<sup>6</sup> at the instance of two persons,<sup>7</sup> though they succeeded each other in the same office.<sup>8</sup> Where a court of equity had decreed one-fourth of a certain sum of money to each of four petitioners, a *mandamus*, brought by two of them against a state officer to compel the payment of their proportions, was denied, because the interests of the relators were separate.<sup>9</sup> Where several persons have been turned out of their offices, though their offices are the same, as common councilmen of a municipality, they cannot sue out a common writ of *mandamus* to compel their restoration, since the wrong done to one is no wrong to the others, nor was the election of one the election of the others. Their interests are several.<sup>10</sup> If an alternative writ of *mandamus* is issued in such

<sup>1</sup> Cooper v. Nelson, 38 Iowa, 440. See § 235.

<sup>2</sup> Newman, Ex parte, 81 U. S. 152; Hammar v. Covington (City), 3 Metc. (Ky.) 494.

<sup>3</sup> Maddox v. Graham, 2 Metc. (Ky.) 56.

<sup>4</sup> Lee Co. v. State, 36 Ark. 276.

<sup>5</sup> Haskins v. Scott Co. (Sup'rs), 51 Miss. 406.

<sup>6</sup> Haskins v. Scott Co. (Sup'rs), 51 Miss. 406; King v. Kingston (Mayor), 8 Mod. 209.

<sup>7</sup> Stephen's Nisi Prius, 2323.

<sup>8</sup> Scott, Ex parte, 8 Dowl. 328.

<sup>9</sup> Heckart v. Roberts, 9 Md. 41.

<sup>10</sup> Andover, Case of, 2 Salk. 433;

a case, it will be quashed if it has been returned; if it has not been returned, it will be superseded.<sup>1</sup> Where, however, several persons were similarly situated and had a common interest at stake, they were allowed to join in one *mandamus* proceeding. They were four officers, against whom charges were preferred, *in globo*. They were tried at the same place and time, and without any severance, and the same testimony was adduced against one and all, and they were removed from office by a single decree.<sup>2</sup>

§ 233. Does the writ abate by the death of the relator or the expiration of his term of office?—It is held that, when a private party applies for a *mandamus*, the proceedings abate with his death,<sup>3</sup> but the death of a copartner among the relators does not abate the writ.<sup>4</sup> When, however, the *mandamus* is prosecuted by a public officer in his official capacity for the public benefit, the law regards the office, and not the adjunct name of the individual, and the writ will not abate at the end of his term, but shall be continued by his successor.<sup>5</sup>

§ 234. The writ must issue against him whose duty it is to do the act desired.—The writ of *mandamus* must issue directly against him whose duty is it to do the thing the parties wish done.<sup>6</sup> The writ has been refused, because the respondents had not the power to do the act desired: to a parish assessor and tax collector to levy a tax;<sup>7</sup> to a town council to restore certain moneys in the hands of the town treasurer to the school account, which by their order he had deducted from that account;<sup>8</sup> and to a county to com-

12 Mod. 332; King v. Chester, 5 Head, 650; Hardee v. Gibbs, 50 Mod. 10; S. C. as Anon., 2 Salk. Miss. 802.  
436.

<sup>1</sup> King v. Kingston (Mayor), 8 Mod. 209.

<sup>2</sup> State v. Shakspeare (La., Dec. 1, 1890), 8 S. Rep. 893.

<sup>3</sup> Booze v. Humbird, 27 Md. 1.

<sup>4</sup> People v. Essex Co. (Sup'rs), 70 N. Y. 228.

<sup>5</sup> Felts v. Memphis (Mayor), 2

<sup>6</sup> Rowland, Ex parte, 104 U. S. 604; Fry v. Reynolds, 33 Ark. 450; People v. Hayt, 66 N. Y. 606; People v. Crotty (Village), 93 Ill. 180; Farrell v. King, 41 Conn. 448; State v. Penn. R. R., 41 N. J. L. 250; State v. Shreveport (City), 29 La. An. 658.

<sup>7</sup> State v. Fournet, 30 La. An. 1103.

<sup>8</sup> State v. Union (Town Council)

pel the return of a tax illegally collected, since the county treasurer or the supervisors were the proper parties.<sup>1</sup> But the writ was considered to be properly addressed: to the custodian of the corporate books in an effort by a stockholder to obtain an examination thereof;<sup>2</sup> but the directors may also be included, when such custodian is acting under their orders in refusing to allow such inspection;<sup>3</sup> to the secretary of state to obtain a patent for United States land, which had been signed, sealed, countersigned and recorded in the record book of the land department;<sup>4</sup> and to the county officers to levy a tax to pay a judgment against a township.<sup>5</sup>

§ 234a. All persons charged with the performance of the duty must be joined as respondents, but none others. The general rule is, that all persons charged with the performance of the duty sought must be made respondents,<sup>6</sup> even though some of them are willing to perform their duty, and in fact are asking for the writ to compel the discharge of duty by their colleagues.<sup>7</sup> When, however, a majority of such persons can legally perform the duty desired, and are willing to do so, the writ will not issue against any of them though one of them may refuse to act, since in such case the writ will be unnecessary.<sup>8</sup> So the writ may include any number of persons as respondents, if the duty is to be performed by all or by one or other.<sup>9</sup> If, however, the duties of the respondents are separate, the writ will be refused. A *mandamus* to make the trustees of two townships discharge their duties relative to a cer-

(N. J., Nov. 8, 1889), 18 Atl. Rep. 571.

<sup>6</sup> Gaal v. Townsend, 77 Tex. 464.

<sup>7</sup> Lyon v. Rice, 41 Conn. 245;

<sup>1</sup> Eyerly v. Jasper County, 72 Iowa, 149.

State v. Jones, 1 Ired. 129; Knight v. Ferris, 6 Houst. 283; Anon., 2 Chit. 254; Q. v. Pickles, 3 Ad. & E. (N. S.) 599.

<sup>2</sup> State v. Bergenthal, 72 Wis. 314; People v. Mott, 1 How. Pr. 247.

<sup>3</sup> People v. Throop, 12 Wend. 183.

<sup>8</sup> White River Bank, In re, 23 Vt. 478.

<sup>4</sup> United States v. Schurz, 103 U. S. 378.

<sup>9</sup> King v. Middlesex (Archd.), 3

<sup>5</sup> Labette Co. (Com'rs) v. United States, 112 U. S. 217.

A. & E. 615.

tain public road was refused, because each township acted for itself, and the duties of the respective trustees were entirely distinct.<sup>1</sup> A *mandamus* was asked to compel a town and a city, which had been carved out of the town, to levy a tax to pay a judgment obtained on town bonds, which had been issued prior to the existence of the city. The writ was refused as to the city, because the duties of the two boards controlling the town and city were several.<sup>2</sup> When a party has been improperly joined as a respondent, the writ will be dismissed as to all parties, the rule being, that the relator must prove his right to all he claims in the alternative writ, to which the peremptory writ is required to conform.<sup>3</sup> A writ of *mandamus* against the governor of a state and the secretary of state of the state was dismissed, because the governor was not amenable to *mandamus* proceedings.<sup>4</sup>

§ 235. All persons concerned in the separate but co-operative steps in the attainment of the result sought may be joined as respondents in one *mandamus*.—One writ of *mandamus* may issue against all officers concerned in the separate but co-operative steps in the attainment of one result in the performance of a general duty.<sup>5</sup> One writ of *mandamus* was considered proper: to a mayor and the capital burgesses to elect a mayor and swear him into office, when it was the duty of the burgesses to elect and

<sup>1</sup> State v. Chester, 10 N. J. L. 292.

<sup>2</sup> State v. Beloit (Sup'rs), 20 Wis. 79.

<sup>3</sup> Rex v. Norwich (Mayor), Stra. 55; Reg. v. Hereford (Mayor), 2 Salk. 70; King v. Smith, 2 M. & S. 583; Buller's Nisi Prius, 200. The opposite is held in State v. Leon (Sup'rs), 66 Wis. 199, but the court assigns no reason for the decision. The writ has been held good as to the respondent upon whom the duty devolved to do the act desired. State v. Mount, 21 La. An. 352;

State v. Weir (Neb., Sept. 22, 1891), 49 N. W. Rep. 785.

<sup>4</sup> People v. Yates, 40 Ill. 126. In another case the writ was granted as to one respondent, while the fact that the governor was a co-respondent was ignored. State v. Nicholls, 42 La. An. 209. In a later case in Illinois (People v. Sec. of State, 58 Ill. 90), the writ was granted as to the state auditor and the state treasurer, while it was refused as to the secretary of state.

<sup>5</sup> Labette Co. (Com'rs) v. United

of the mayor to swear into office;<sup>1</sup> to a mayor and the city council to take certain land in payment of the assessments for improvements, and to pay the value of the equity therein, when the action of the city council in taking the land required the approval of the mayor;<sup>2</sup> to the clerk of the county court and two justices of the peace, as canvassers of the votes, to count the votes and enter the result, and to the clerk to issue a certificate of election to the legislature;<sup>3</sup> to the lord of the hundred and the steward to hold a leet-court, and appoint the proper officers;<sup>4</sup> to the auditor and treasurer of state, the one to draw his warrant, and the other to pay it;<sup>5</sup> and to the lord of the manor, as well as to the steward thereof, in a proceeding by *mandamus* to compel the admission of a party to a customary or copyhold estate, in order that the interests of the lord might be more effectually protected.<sup>6</sup> In order to compel the election of a mayor of a borough, one *mandamus* was issued against the lord and steward of a leet to hold a leet-court, against the bailiff of the leet and his deputy to return and deliver the panel or list of the jury into the leet-court, against the steward of the leet to swear the jury, and against the twenty-four jurors to allow themselves to be sworn, and to proceed to elect a mayor of the borough.<sup>7</sup> When it has not appeared that such parties have any objection to discharging the duties devolving upon them after the discharge of precedent duties by other officers, the courts have not required that they be joined in the *mandamus* proceedings.<sup>8</sup> A township had passed an ordinance, in accordance with the law, that if a railroad was completed to a certain point by

States, 112 U. S. 217; *State v. Bailey*, 7 Iowa, 390.

<sup>1</sup> *King v. Abingdon (Mayor)*, 1 L. Raym. 559; *King v. Tregony (Mayor)*, 8 Mod. 111, 127; *R. v. Bankes*, 3 Burr. 1452.

<sup>2</sup> *Farnsworth v. Boston (City)*, 121 Mass. 173.

<sup>3</sup> *People v. Hilliard*, 29 Ill. 413.

<sup>4</sup> *King v. Milverton (Lord of Hundred)*, 3 Ad. & E. 284.

<sup>5</sup> *State v. Smith*, 43 Ill. 219; *State v. Bordelon*, 6 La. An. 68; *People v. Secretary of State*, 58 Ill. 90.

<sup>6</sup> *Q. v. Powell*, 1 Q. B. 352.

<sup>7</sup> *Rex v. Bankes*, 3 Burr. 1452.

<sup>8</sup> *State v. Richter*, 37 Wis. 275.



a designated time, and by their vote the inhabitants of the township should approve thereof, then the town reeve should make out and deliver to the railroad company debentures of the township to a certain amount, which should have the seal of the township thereto, and should be signed by the reeve and the town treasurer. Upon an application for a *mandamus* to compel the reeve to deliver the debentures properly signed and sealed to the railroad company, it appeared that the railroad had been completed to the point designated within the limited time, and that the vote of the inhabitants had been in favor of the subscription. The court made the rule to show cause absolute, holding that the township was not a necessary party, since it had nothing further to do in the matter, and that the town treasurer was not a necessary party, as it did not appear that he was not willing to sign the debentures so soon as they were presented to him.<sup>1</sup>

§ 236. **Contrary rulings on the last proposition.**— There are a few decisions which have denied the right to make such joinder of respondents. A judgment that *mandamus* issue against a city comptroller to draw his warrant on the city treasurer for the amount due on bills which he had approved, and against the latter to pay such warrants when drawn, was on appeal affirmed as to the comptroller, but dismissed as to the city treasurer, because he was not in default, since no warrants had as yet been drawn on him.<sup>2</sup> Where a writ of *mandamus* was requested to compel the board of canvassers, of which the secretary of state was a member, to re-assemble and count the votes properly, and to the secretary of state to record their findings and to give the relator the proper certificate of his election, the court considered that the application for a *mandamus* against the secretary of state could not be united with the application for the writ against the board of canvassers. Since the board of canvassers had not made a return of the election

<sup>1</sup> Canada C. R. R. et al., In re, 35  
Up. Can. Q. B. 390.

<sup>2</sup> State v. Mount, 21 La. An. 352.

of the relator, the secretary had not been derelict in the duty desired from him. The court maintained that it would be an abuse of justice to convict one of non-feasance or misdemeanor in neglecting his official duty in failing to certify to a fact, when the fact does not exist, or when he has not refused to do what may be required, and to mulct him in costs when he is not in default.<sup>1</sup> This decision is contrary to the general current of decisions, and does not seem to be in accord with the principles of justice. Occasions may arise where, under this ruling, a party would be compelled to resort to successive writs of *mandamus* before he could finally obtain his rights; and in some cases he will be practically deprived of his rights, either by the termination of his term of office or by a change of external circumstances. On the other hand, if such joinder be permitted in *mandamus* proceedings, the parties so joined as respondents may in their returns disclaim any intention to obstruct proceedings or to refuse to perform the duty desired when the occasion therefor may arise, and the courts can award the costs according to their discretion.

**§ 237. How the mandamus should be directed when a corporation is the respondent.**—If the act sought is a duty incumbent on a corporation, the writ of *mandamus* should be directed to the corporation itself;<sup>2</sup> or to the select body of officers within the corporation, whose province or duty it is to perform the particular act, or to put the necessary machinery in motion to secure its performance;<sup>3</sup> or

<sup>1</sup> State v. Gibbs, 13 Fla. 55.

<sup>2</sup> City v. Sansum, 87 Ill. 182; King v. Smith, 2 M. & S. 583; King v. Taylor, 3 Salk. 231; Fisher v. Charleston (City), 17 W. Va. 595; State v. Chicago, etc. R. R., 79 Wis. 259; 48 N. W. Rep. 243.

<sup>3</sup> State v. Penn. R. R., 41 N. J. L. 250; Rex v. Abingdon (Mayor), 2 Salk. 700; 1 Ld. Raym. 559; Rex v. Norwich (Mayor), Stra. 55; Mayor v. Lord, 9 Wall. 409; Labette Co.

(Com'rs) v. United States, 112 U. S. 217; King v. Smith, 2 M. & S. 583; Fisher v. Charleston (City), 17 W. Va. 595; Buller's Nisi Prius, 200; Louisville (City) v. Kean, 18 B. Mon. 9; Eufaula (City Council) v. Hickman, 57 Ala. 338; Com. v. Pittsburgh (Select Council), 34 Pa. St. 496; People v. Throop, 12 Wend. 183; People v. New York (Com. Coun.), 3 Keyes, 81; People v. Bloomington (Mayor), 63 Ill. 207.

to the corporation and the select body jointly.<sup>1</sup> When, however, the writ of *mandamus* is addressed to a select body within a corporation, a board or tribunal composed of several persons, the question remains, whether the writ should be addressed to such body or board, as such, or to all the members thereof individually. Some courts consider it proper to address the writ to the body or tribunal who are to perform the act, omitting the names of the members thereof;<sup>2</sup> other courts have thought it proper to address the writ to the individuals composing such board or tribunal, with the addition of their titles or offices;<sup>3</sup> again either mode has been considered to be admissible.<sup>4</sup> Where a board of supervisors of a county were required to reconvene to declare a certain resolution to have been adopted, when by an erroneous interpretation it had been declared to have been rejected, and to so record it, it was considered that the writ might run alone to the chairman and clerk of the board to reconvene the board, to declare the resolution to be carried and to so record the proceedings.<sup>5</sup> It would seem from these decisions that it is immaterial whether in a *mandamus* proceeding to compel action by a municipality, a board, or a tribunal composed of several members, the respondents are the officers charged with the duty, or the select body composed of such officers, or the municipal body, board or tribunal. Where in a *man-*

<sup>1</sup> *State v. Milwaukee (City)*, 25 Wis. 122; *Wren v. Indianapolis (City)*, 96 Ind. 206; *Rex v. Norwich (Mayor)*, Stra. 55; *Regina v. Hereford (Mayor)*, 2 Salk. 701; *King v. Smith*, 2 M. & S. 583; *Buller's Nisi Prius*, 200.

<sup>2</sup> *People v. Champion*, 16 John. 61; *Pees v. Leeds (Mayor)*, Stra. 640; *State v. Milwaukee (City)*, 25 Wis. 122; *Wren v. Indianapolis (City)*, 96 Ind. 206.

<sup>3</sup> *Hollister v. Lucas Co. Ct. (Judges)*, 8 Ohio St. 201; *Mottu v.*

*Primrose*, 23 Md. 482; *Eufaula (City Coun.) v. Hickman*, 57 Ala. 338; *Com. v. Pittsburgh (Sel. Coun.)*, 34 Pa. St. 496. In such cases the writ will be bad, if it extends beyond the persons required by the charter to concur in the thing commanded to be done. *King v. Smith*, 2 M. & S. 583.

<sup>4</sup> *St. Louis Co. Court v. Sparks*, 10 Mo. 117; *Louisville (City) v. Kean*, 18 B. Mon. 9.

<sup>5</sup> *People v. Brinkerhoff*, 68 N. Y. 259.

*damus* proceeding against a corporation the members thereof were made the respondents, and not the corporation itself, the court considered any objection to such action to be merely technical, and to be waived if not taken *in limine*.<sup>1</sup> In proceedings to punish for contempt, though the *mandamus* was directed to the body or tribunal, as such, the individuals alone, who disobey, will be punished.<sup>2</sup> Where it is held that a *mandamus* to compel action by a public body may be brought against the individuals composing such body, the doctrine of discontinuance does not apply relative to the members not served, and a court would err if it allowed the relator to discontinue the proceedings as to those not served.<sup>3</sup> When the writ is directed to a municipal corporation, as such, under the common law it is to be delivered to the mayor thereof or other chief officer, as the most visible part of the corporation.<sup>4</sup> When the writ is against a private corporation, by the common law it should be served on the head officer of the company, or upon the select body within the corporation whose province it is to put in motion the machinery necessary to secure performance of the duty commanded, or upon that superior officer who would be expected to carry out a general order of the governing body of the corporation for the doing of the thing enjoined by the writ, the command of the writ standing for the corporate order.<sup>5</sup> But the mode of service of all legal writs is regulated by statute, where the necessary guidance in the matter must be sought.

**§ 238. Does the writ abate upon the resignation or expiration of the term of office of the respondent?—** Whether if an officer resigns or goes out of office during the pendency of *mandamus* proceedings against him, the

<sup>1</sup> Fuller v. Plainfield A. School, 6 Conn. 532.

<sup>2</sup> People v. Champion, 16 John. 61; St. Louis Co. Court v. Sparks, 10 Mo. 117; Houston (City) v. Emery, 76 Tex. 321; Eufaula (City Coun.) v. Hickman, 57 Ala. 338.

<sup>3</sup> Eufaula (City Coun.) v. Hickman, 57 Ala. 338.

<sup>4</sup> Regina v. Chapman, 6 Mod. R. 152; People v. Cairo (City Council), 50 Ill. 154.

<sup>5</sup> State v. Penn. R. R., 42 N. J. L. 490.

cause can be further prosecuted, or revived against his successor, is a matter upon which there is a difference of opinion. On the one hand it is held that the cause may continue; that the proceeding is against the officer, and not against the individual; and that such a course is necessary for the due administration of justice, since otherwise the court might be baffled by regular changes in office, or by resignations made for that purpose.<sup>1</sup> It has also been held that the writ may be revived against the successor of the respondent,<sup>2</sup> or it may proceed after a suggestion on the record of the change of respondent;<sup>3</sup> and where an officer's term had expired before he had obeyed a peremptory writ, a rule was granted for the successor to show cause why he should not be made a party to the proceedings and a peremptory writ issued against him.<sup>4</sup> On the other hand it is held that the death or resignation of an officer abates a *mandamus* proceeding against him; that no matter out of what facts or relations the duty has grown, what the law regards and what it seeks to enforce by this writ is the personal obligation of the individual to whom it addresses the writ; if he be an officer and the duty be an official act, still the writ is aimed exclusively against him as a person, and he only can be punished for disobedience. The writ does not reach the office. It cannot be directed to it. In proceedings by *mandamus* a demand is necessary, and if a demand were made, the successor might comply with its requirements. It was considered that a statute was necessary to allow *mandamus* proceedings to be continued against the successor of the respondent.<sup>5</sup> When the *man-*

<sup>1</sup> State v. Gates, 22 Wis. 210; State v. Packett, 7 Lea, 709; People v. Wexford Co. Treas., 37 Mich. 351; State v. Warner, 55 Wis. 271; Rochester (Mayor) v. Queen, 27 L. J. Q. B. 434; People v. Collins, 19 Wend. 56; People v. Bacon, 18 Mich. 247; Clark v. McKenzie, 7 Bush, 523; Doolittle v. Branford (Selectmen), 59 Conn. 402.

<sup>2</sup> Hardee v. Gibbs, 50 Miss. 802. So implied in State v. Guthrie, 17 Neb. 113.

<sup>3</sup> Lindsey v. Kentucky (Auditor), 3 Bush, 231.

<sup>4</sup> People v. Barnett (Sup'r), 100 Ill. 332.

<sup>5</sup> United States v. Boutwell, 17 Wall. 604; Secretary v. McGarrahan, 9 Wall. 298. It is difficult to

*damus* proceeding is allowed to continue, though the respondent has gone out of office, without any notification to his successor, and the peremptory writ is issued, proceedings for contempt will not be sustained, unless some notice of the court's action, or a request to him to obey such order, has been served on such successor.<sup>1</sup>

§ 239. When the resignation alone does not vacate the office, such resignation may be disregarded till the office is legally vacated.— Where, however, an officer's resignation by law is not effective till it is properly accepted or his successor has qualified, it may be disregarded in such proceedings till it has been accepted or his successor has qualified;<sup>2</sup> but ordinarily a resignation is effective so soon as it is made.<sup>3</sup> Where a charter was repealed, but the existing officers were continued with power to levy and collect taxes to pay the debts of the municipality, the court denied their power to resign with a view to escape from such duties, where the law had made no provision for the discharge of those duties by others or for successors to the incumbents.<sup>4</sup> Since the proceedings in writs of *mandamus* have

reconcile these decisions with the subsequent one of *Thompson v. United States*, 103 U. S. 480. In the latter case, which was a proceeding to compel a town clerk to make and deliver to the supervisor of the town a copy of a judgment against the town, in order that the latter might include it in his tax levy, the court held that the proceedings did not abate by the resignation of the town clerk. The court, however, endeavored to distinguish this case from other cases in which it had held that the writ abated by such resignation. The court said that "the cases in which it has been held by this court that an abatement takes place by the expiration of the term

of office have been those of officers of the government, whose alleged delinquency was personal, and did not involve any charge against the government whose officers they were." Why do not all cases of *mandamus* against officers fall under this category?

<sup>1</sup> *State v. Warner*, 55 Wis. 271.

<sup>2</sup> *United States v. Badger*, 6 Biss. 308; S. C. as *Badger v. United States*, 93 U. S. 599; *Jones v. Jefferson City*, 66 Tex. 576; *Edwards v. United States*, 103 U. S. 471.

<sup>3</sup> *State v. Lincoln (Mayor)*, 4 Neb. 260; *Amy v. Watertown*, 130 U. S. 301.

<sup>4</sup> *Gorgas v. Blackburn*, 14 Ohio, 252.

been largely an outgrowth of judicial legislation, it would seem but proper to allow their revival against the successor of the respondent in accordance with the dictates of justice. Some courts have considered it to be better to bring the writ against the officer by the title of the office, omitting his own name, to avoid any inconvenience from change of person in the office;<sup>1</sup> and precedents therefor may be found among the early cases.<sup>2</sup>

§ 240. When a corporation or a select body is the respondent, no change in its membership will affect the proceedings.—When, however, the writ of *mandamus* is brought against a corporation, or a select body or board, it is universally agreed that the proceedings will be in no way affected by any change in the membership of such body or board, since a body is always in existence to discharge the duty required of it.<sup>3</sup> The performance of the duty will be required of those in office when the peremptory writ issues, and they will be held responsible for any disobedience.<sup>4</sup> Where, however, a municipal corporation has been abolished and its functions have been distributed among two new corporations, each of which has a different jurisdiction from that of the former corporation, and upon neither has the power been conferred to do the act desired, though the former corporation possessed such power, in such cases a *mandamus* will not lie to compel the performance of such act. The only remedy is an application to the legislature.<sup>5</sup>

<sup>1</sup> *Chance v. Temple*, 1 Iowa, 179; *State v. Madison (City)*, 15 Wis. 30; *State v. Elkinton*, 30 N. J. L. 335. *Sheaff v. People*, 87 Ill. 109; *State v. New Orleans*, 35 La. An. 68;

<sup>2</sup> *Reg. v. Clitheroe*, 6 Mod. 133.

<sup>3</sup> *Com'rs v. Sellew*, 99 U. S. 624; *Hollon Parker, Petitioner*, 131 U. S. 221. *United States v. Dubuque Co. (Com'rs)*, Morris, 31; *Pegram v. Cleaveland Co. (Com'rs)*, 65 N. C. 114; *Columbia Co. (Com'rs) v. Bryson*, 13 Fla. 281; *Fisher v. Charleston (City)*, 17 W. Va. 595; *State v. Guthrie*, 17 Neb. 113; *Doolittle v. Branford (Selectmen)*, 59 Conn. 403;

<sup>4</sup> *State v. Madison (City)*, 15 Wis. 30; *Columbia Co. (Com'rs) v. Bryson*, 13 Fla. 281; *Pegram v. Cleaveland Co. (Com'rs)*, 65 N. C. 114; *Com'rs v. Sellew*, 99 U. S. 624.

<sup>5</sup> *Barkley v. Levee Com'rs*, 93 U. S. 258.

§ 241. **Mandamus not lie to one having no duty in the premises, or who has gone out of office.**— Parties who have no duties in the premises or whose term of office has expired, or whose offices have been abolished, cannot be made respondents in proceedings by *mandamus*. A *mandamus* will not lie: to a canvassing board to re-assemble and count the votes after the repeal of the law by which such board was created;<sup>1</sup> to compel the mayor of a municipality to act as such after the abolition of such municipality by statute;<sup>2</sup> to make a judge sign a bill of exceptions after he has gone out of office;<sup>3</sup> to compel an assessor to assess certain property, when he has no longer any control over the assessment;<sup>4</sup> or to compel a party to do any official act, when he is *functus officio*, and the act is not within his power.<sup>5</sup> Though there is some contrariety of opinion as to whether a canvassing board, after it has declared the result of the count of the votes and adjourned *sine die*, can be required to reconvene and recount the votes in a proper manner, yet the weight of opinion is, that their duties continue till they have discharged their duties properly, in the absence of a law limiting the existence of the board, and that they can be compelled to reconvene.<sup>6</sup>

§ 242. **Can third parties be subsequently brought in as relators or respondents?**— Whether after *mandamus* proceedings have been instituted other persons can be made parties thereto, either at their own request, or by order of court on suggestion or at its own motion, is a question which has often been considered by the courts. Some courts have denied the propriety of such proceedings, claiming that the only parties to a *mandamus* proceeding are the relator, who claims to be entitled to the performance by an officer of some duty imposed on him by law,

<sup>1</sup> Mackey, Ex parte, 15 S. C. 322;  
State v. Gibbs, 13 Fla. 55.

<sup>2</sup> State v. Steen, 43 N. J. L. 542.

<sup>3</sup> *Ante*, § 193.

<sup>4</sup> State v. Archibald, 43 Minn. 328.

<sup>5</sup> State v. Waterman, 5 Nev. 323;  
Lamar v. Wilkins, 28 Ark. 34;  
Mason v. School Dist., 20 Vt. 487.

<sup>6</sup> *Ante*, § 185.



and the officer who refuses to perform such duty.<sup>1</sup> A *mandamus* proceeding was instituted to compel the levy of a tax to pay a debt claimed to be due to A. Citizens of the borough asserted a right to intervene and defend, and alleged fraud and collusion between A. and the borough authorities. The court refused their application, stating that they had no common-law right to intervene.<sup>2</sup> Where an application was made to compel by *mandamus* the clerk of a common council to amend his record so as to show the appointment of the relator by the council as a policeman in the place of A., it was held that neither A. nor the city was a necessary or proper party to the action, that the question was merely as to the truth of a record, and that the effect of the proceeding on the rights of others was immaterial.<sup>3</sup> Certainly a third party should not be allowed to intervene as a relator, and claim affirmative relief in his own behalf, thus introducing a foreign element into a suit brought by another. Where a city treasurer sought to obtain by *mandamus* money belonging to the city in the hands of the county treasurer, the interplea of another, who claimed himself to be the city treasurer, asking that the money be ordered to be paid to him, was dismissed, nor was he allowed to appeal from the judgment rendered, since he was not a party to the proceeding.<sup>4</sup> A town treasurer asked for a *mandamus* to compel the payment to him of money collected by the sheriff for the benefit of the town. The sheriff in his return admitted the collection of the money mentioned, but averred that the county officers had ordered him to pay it to the county treasurer, averred that he was indifferent as to the matter, and prayed that the county be made a party to the proceedings. The county filed an interplea, praying to be made a party thereto, and setting up a defense to the writ. The court decided that the county had no claim to be made

<sup>1</sup> *State v. Smith*, 7 Rich. (N. S.) 275;  
*State v. Williams*, 96 Mo. 13.

<sup>2</sup> *Hower's Appeal*, 127 Pa. St. 134.

<sup>3</sup> *Farrell v. King*, 41 Conn. 448.

<sup>4</sup> *Winstanley v. People*, 92 Ill. 402.

a party to the proceedings, and that the respondent could not by his answer turn a *mandamus* proceeding into a bill of interpleader.<sup>1</sup>

§ 242a. **Subject continued.**—There are, however, so many decisions that a third party, whose interests are affected by the proceedings, may be brought into them as a respondent, that such may be considered to be the general rule. In a *mandamus* proceeding to compel the election of a mayor of a borough, wherein a prior election was claimed to be void, the court ordered that the mayor *de facto* be served, asserting that common justice required he should be heard in his defense before an order was issued to elect another person in his place.<sup>2</sup> Upon the filing of an application for a rule on the judges of a court to show cause why a *mandamus* should not issue directing them to admit the relator as clerk of their court, it was ordered that the incumbent of the office should be notified of the proceedings.<sup>3</sup> Upon an application for a *mandamus* to compel the board of examiners to give a certificate of election to the relator, though they had already issued a certificate to A., the court ordered that notice of the proceedings be given to A.;<sup>4</sup> and in a similar case a notice was ordered to be given to the incumbent of the office.<sup>5</sup> A *mandamus*, to make a judge render judgment in a case on an alternative verdict according to the election of the plaintiff, was refused without prejudice, and with liberty to review the application after notice thereof had been given to the defendant in such case.<sup>6</sup> In a proceeding by *mandamus* to compel the road overseer to remove certain fences placed across a highway, the court required the party who owned the land where the fences were, and who had put them up, to be made a party defendant and to be served with notice.<sup>7</sup> In a case where the supervisors were ordered to remove trees from a road,

<sup>1</sup> State v. Burkhardt, 59 Mo. 75.

<sup>2</sup> Rex v. Bankes, 3 Burr. 1452.

<sup>3</sup> Dew v. Sweet Springs (Judges), 3 Hem. & M. 1.

<sup>4</sup> Luce v. Mayhew, 13 Gray, 83.

<sup>5</sup> Strong, Petitioner, 20 Pick. 484.

<sup>6</sup> State v. Mills, 27 Wis. 403.

<sup>7</sup> Larkin v. Harris, 36 Iowa, 93.

the person who was benefited by the trees was made a party to the proceedings, and apparently without objection.<sup>1</sup> In a proceeding to compel the granting of the probate of a will to the executors thereof, it was ordered that the *cestuis que trust* be notified and allowed to answer.<sup>2</sup> When in a *mandamus* proceeding to compel the auditor of state to issue a certificate to the relator, the return stated that B. had obtained an injunction against his so doing, the court required B. to be made a party to the proceedings before a peremptory writ would be granted.<sup>3</sup> In a *mandamus* proceeding to compel a justice of the peace to assess the damages in a replevin suit which he had dismissed, the plaintiff in the replevin suit was made a respondent, and the court assessed the costs of the proceedings against him.<sup>4</sup> In a proceeding to compel a returning officer to issue to the relator a certificate of election, a third party who claimed to have been elected asked to be made a party to the proceedings, and asserted that the return of the respondent was evasive and collusive. The court ordered that such third party be admitted as a party, unless the respondent properly corrected his return as to the matters objected to.<sup>5</sup> In a proceeding to compel a county treasurer to execute tax deeds for lands sold for taxes, the owner of the land was allowed to intervene.<sup>6</sup> In proceedings to compel a tax collector to pay money collected as taxes, which after litigation had been declared to be legal, into the public treasury at the time required by law, intervenors were allowed to become parties thereto.<sup>7</sup> Where a party tried by this proceeding to compel the state treasurer to recognize him as the fiscal agent of the state and to deposit with him all the public funds, the state was allowed to intervene.<sup>8</sup> Where there was an effort to procure a *mandamus* to compel the elec-

<sup>1</sup> Patterson v. Vail, 43 Iowa, 142.

<sup>2</sup> Rex v. Simpson, 3 Burr. 1463.

<sup>3</sup> Livingston v. McCarthy, 41 Kans. 20.

<sup>4</sup> Johnson v. Dick, 69 Mich. 108.

<sup>5</sup> State v. Williams, 99 Mo. 291.

<sup>6</sup> State v. Patterson, 11 Neb. 266.

<sup>7</sup> People v. Austin, 46 Cal. 520.

<sup>8</sup> State v. Dubuclet, 27 La. An. 29.

tion board to recanvass the votes for the location of the county seat, citizens were allowed to intervene on their allegation of collusion and fraud between the relator and the respondents relative to such recanvass.<sup>1</sup> To an application to compel a sheriff to serve a warrant of arrest on A. and carry him before a justice of the peace for trial, A. was allowed to appear by attorney in opposition to the application.<sup>2</sup> It was considered that, in order to be allowed to intervene in such cases, the applicant must show that he will either gain or lose by the direct legal operation or effect of any decision that may be rendered therein.<sup>3</sup> To an application to compel a railroad company to receive and recognize A. as a director, instead of B., who was acting as such, the court refused to consider the matter until B. was made a party to the proceedings.<sup>4</sup>

**§ 243. Third persons interested should be allowed to intervene or should be made parties.**—It would seem to be but proper for the relator in the first instance to make a third person a party to the *mandamus* proceedings, as a respondent therein, in all cases where he has such interests in the matter that the court upon application will order that he be made a party. Furthermore, for the enlightenment of the court and the furtherance of justice, it is desirable that the party representing the adverse interest should be a party to the proceedings, especially as the officer, who is the actual respondent, is often indifferent on the subject. In one case, where a third party's intervention in the proceedings was dismissed, the court recognized the necessity for the presentation of his defense by stating that he might advance it by using the respondent's return for that purpose, the respondent assenting thereto.<sup>5</sup> Owing to the con-

<sup>1</sup> State v. Matley, 17 Neb. 564.

<sup>2</sup> Beecher v. Anderson, 45 Mich. 543.

<sup>3</sup> State v. Wright, 10 Nev. 167.

<sup>4</sup> Cross v. West Va. etc. R. R., 34 W. Va. 742.

<sup>5</sup> State v. Burkhardt, 59 Mo. 75.

The same court in a subsequent case was compelled to issue an order that the respondent, who was indifferent as to the result, should amend his return in order to protect the rights of a third party, or in default thereof such third party

flict in the decisions, it seems better not to make a party a respondent in the proceedings, when there is any doubt as to the propriety thereof, and to leave the matter to the court, which can order that such parties be added as respondents, if it deems it proper.<sup>1</sup>

§ 244. **Third parties not allowed to intervene to litigate matters not involved in the mandamus proceedings.**— When, however, the interests sought to be protected cannot properly be litigated in *mandamus* proceedings, the parties will not be allowed to appear therein as respondents. In a *mandamus* proceeding to compel the auditor of state to draw his warrant on the state treasurer, a party claiming a lien upon the debt due from the state to the relator will not be allowed to intervene in order to litigate with the relator the validity of his claim.<sup>2</sup> So when a party applied for a *mandamus* to compel the proper city officer to record his judgment against the city, as required by law, and the officer in his return claimed that such judgment could only be recorded against certain funds collected by the city for the benefit of A., and asked for a rule for A. to show cause why this should not be done, which rule was granted, the appellate court in its review decided, that a third party could not be brought in to answer a call made upon an officer to perform a mere ministerial duty.<sup>3</sup>

would be admitted as a party to the proceedings. *State v. Williams*, 99 Mo. 291.

<sup>1</sup> *State v. Johnson Co.* (Bd. Equal.), 10 Iowa, 157.

<sup>2</sup> *Hewitt v. Craig*, 86 Ky. 23.

<sup>3</sup> *State v. Brown*, 28 La. An. 103.

## CHAPTER 19.

### PLEADINGS AND PRACTICE IN MANDAMUS PROCEEDINGS.

- § 245. First proceeding is a motion asking for the writ.
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- 247. The affidavits for the motion should be entitled of the court but not of the cause.
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- 249. Action of the court on the petition for a *mandamus*.
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- 259. The alternative writ must show that the relator has no legal remedy except the writ of *mandamus*.
- 260. Particularity required in the mandatory clause of the alternative writ.
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- § 304. When an appeal lies in a *mandamus* proceeding under English law.
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307. Proceedings in review in the appellate court.
308. The right to review *mandamus* proceedings by appeal or writ of error does not always exist.
309. Is a peremptory *mandamus* suspended by an appeal with an indemnifying bond?
310. Costs in *mandamus* proceedings.<sup>1</sup>

§ 245. **First proceeding is a motion asking for the writ.**—The usual course in applying for a *mandamus* is to make a motion in open court, founded upon an affidavit or a sworn petition.<sup>1</sup> Affidavits which were introduced in such cases might be made by third parties,<sup>2</sup> who were not interested and were competent.<sup>3</sup> The proceedings are often regulated by statute,<sup>4</sup> but it is not believed that such statutes depart much from the common-law practice. In one state it is permissible in a suit at law to ask in the complaint for a *mandamus* to enforce the judgment when obtained,<sup>5</sup> which is in conformity with the recent legislation in England. In some courts leave must first be obtained from the court before it is admissible to make an application for a *mandamus*.<sup>6</sup> The usual practice now is for the relator to file a petition which contains all the averments necessary to put the court in full possession of all the facts in the case, and shows the necessity for the relief desired, and at the same time requests such relief.

<sup>1</sup> Potts v. State, 75 Ind. 336; Ter. v. Potts, 3 Mont. 364; State v. Gracy, 11 Nev. 223; Fisher v. Charleston (City), 17 W. Va. 595; Long v. State, 17 Neb. 60. Sometimes the motion itself is in writing. Stafford v. Union Bank, 17 How. 275.

<sup>2</sup> Swan v. Gray, 44 Miss. 393.

<sup>3</sup> Cannon v. Janvier, 3 Houst. 27.

<sup>4</sup> Cook v. Tannar, 40 Conn. 378; State v. Jefferson (Pol. Jury), 33 La. An. 29.

<sup>5</sup> Fry v. Montgomery Co. (Com'rs), 82 N. C. 304.

<sup>6</sup> People v. Thistlewood, 103 Ill. 139; Hawkins v. Hardin, 35 Ill. Ap. 25.



§ 246. **The motion for a mandamus must be verified.**—Whether the statute requires that the petition for a *mandamus* be sworn to or sustained by affidavit,<sup>1</sup> or not, yet the courts themselves will require such petitions to be so sustained.<sup>2</sup> Where the court was asked to issue a *mandamus* to the judge of a lower court relative to certain litigation then pending before him, the court examined the certified record of that litigation, and decided that his action was to be presumed to be correct in the absence of a *prima facie* showing to the contrary sustained by affidavit. The court thereupon dismissed the proceedings, though the writ was asked for by the attorney-general in his official capacity.<sup>3</sup> In a subsequent case the same court examined the record of the lower court, of which a certified copy was filed with the petition, but refused to consider the statements of the petition because it was not verified.<sup>4</sup> It is asserted that the verification is required, lest the time of the court should be taken up with frivolous applications.<sup>5</sup> The petition and the affidavit need not be separate papers.<sup>6</sup> There have been a few cases where affidavits were not demanded. Where the attorney-general asked for a *mandamus* in behalf of the state, an affidavit was not required.<sup>7</sup> In a matter of right, as where a *mandamus* was asked to restore a person to office, it was stated that an affidavit of the facts was not required, but that it was required when a failure of duty was charged against an officer.<sup>8</sup>

<sup>1</sup> *Lafayette (City) v. State*, 69 Ind. 218.

<sup>5</sup> *Black v. Auditor*, 26 Ark. 237.

<sup>2</sup> *Brown v. Ruse*, 69 Tex. 589; *Curser and Smith*, 1 Barn. (K. B.) 59; *Postmaster-Gen. v. Trigg*, 11 Pet. 173; *Poultney v. La Fayette (City)*, 12 Pet. 472; *Hardee v. Gibbs*, 50 Miss. 802; *Hall v. Crossman*, 27 Vt. 297.

<sup>6</sup> *Golden C. Co. v. Bright*, 8 Colo. 144.

<sup>3</sup> *Postmaster-General v. Trigg*, 11 Pet. 173.

<sup>7</sup> *State v. Wilmington B. Co.*, 3 Harring. 312; *Woodruff v. New York, etc. R. R.*, 59 Conn. 63; *Doolittle v. Branford (Selectmen)*, 59 Conn. 402. *Contra*, *Postmaster-General v. Trigg*, *ante*.

<sup>4</sup> *Poultney v. La Fayette (City)*, 12 Pet. 472.

<sup>8</sup> *Q. v. Cory*, 3 Salk. 230; *People v. Chicago (City)*, 25 Ill. 483.

§ 247. **The affidavits for the motion should be entitled of the court, but not of the cause.**—The affidavits offered upon an application for a *mandamus*, or the petition which is generally verified and presented as an affidavit, should be entitled of the court to which the presentation is made, but, it is said, should not be entitled of a suit.<sup>1</sup> It was considered that there was no suit till the court had authorized proceedings to be taken in the matter, and that, if the affidavits were so entitled prior to any action by the court, it would be difficult, if not impossible, to indict for perjury on such affidavits.<sup>2</sup> This ruling, in the light of the reasons assigned therefor, seems to the writer to be untenable. If an indictment will lie on affidavit not entitled of a suit, the writer does not see why it will not lie if the affidavit is so entitled. The gravamen of the charge is the falsity of the statements, and the non-existence of the suit does not diminish such falsity, but, if anything, increases it. Why may not the title of the cause be rejected as surplusage, as has been suggested.<sup>3</sup> It is a common practice in injunction proceedings and suits by attachment to make affidavits in support thereof and to entitle them of a cause, prior to the filing of any papers in the court, and prior to the institution of the suit in any manner. Though the courts have ruled that these affidavits should not be entitled of a cause, yet they hold such matters to be merely formal, and that any objection to such entitling will be considered to be waived, unless it is taken *in limine*, as on the reading.<sup>4</sup> The writer thinks it is advantageous and expedient to entitle the petition, which is generally also the affidavit, because

<sup>1</sup> King v. Hare, 13 East, 189; Rex v. Warwickshire (Just.), 5 Dowl. 382. (Board Equal.), 10 Iowa, 157; People v. Tioga Com. Pleas, 1 Wend. 291; Haight v. Turner, 2 John. 370.

<sup>2</sup> Hollis v. Brandon, 1 Bos. & Pul. 36; Rex v. Warwickshire (Just.), 5 Dowl. 382; Nohro, Ex parte, 1 B. & C. 267; Chance v. Temple, 1 Iowa, 179; State v. Johnson Co. 10 Iowa, 157.

<sup>3</sup> Rex v. Warwickshire (Just.), 5 Dowl. 382.

<sup>4</sup> Chance v. Temple, 1 Iowa, 179; State v. Johnson Co. (Board Equal.), 10 Iowa, 157.

it serves to explain and identify such papers, and as a guide to the clerk, who may subsequently issue the alternative writ;<sup>1</sup> and also because by statute or agreement of parties it may operate as an alternative writ of *mandamus*, which is in such cases dispensed with.<sup>1</sup> So soon as there is a proceeding in court, which occurs as soon as the court grants a motion to show cause or an alternative writ, all affidavits or other papers filed therein subsequent thereto must be entitled of the cause or they will not be considered.<sup>3</sup>

§ 248. **Sufficiency of the jurat to the petition for a mandamus.**—The sufficiency of the jurat to the application for a *mandamus* will depend generally upon the statutory rules as to jurats. Where an application was verified on the information and belief of the relator, such verification was not considered to be sufficient, since the facts in the case were of such a nature that they were, or should have been, in the knowledge of the relator, and under the circumstances the trial court was justified in refusing the writ, there having been no appearance for the respondent.<sup>4</sup> On the other hand, it was considered to be sufficient that the form of the jurat to the petition be the same as that portion of an ordinary affidavit in a personal action.<sup>5</sup> The English practice was to support the petition or motion by the affidavits of parties who were cognizant of the facts, in which cases it was proper to require them to swear absolutely as to the truth of the facts they stated. Where, however, a statute requires, or custom authorizes, a petition, stating all the facts showing the right on the part of the relator, and the duty and the delinquency on the part of the respondent, sworn to by the relator, it is proper that in the jurat the relator should swear positively as to the facts within his knowledge, and that the other allegations are true according to his best knowledge and belief. The courts generally seem

<sup>1</sup> *Post*, § 264.

<sup>2</sup> *Post*, § 262.

<sup>3</sup> *Grantham, In re*, 4 D. & L. 427; (*Mayor*), 4 Neb. 260.  
*King v. Pierson, Andrews*, 310, n.

<sup>4</sup> *State v. School Districts*, 8 Neb.

98. See, also, *State v. Lincoln*

<sup>5</sup> *State v. Wright*, 10 Nev. 167.

to be satisfied with an affidavit which is as positive as it is within the power of the relator to make it.<sup>1</sup>

§ 249. **Action of the court on the petition for a mandamus.**— The application for the writ of *mandamus* is usually heard by the court *ex parte*,<sup>2</sup> though the court may order that the parties against whom the writ is desired be notified in order that they may appear and resist the allowance of the writ, if they so desire.<sup>3</sup> The petition should be addressed to the court before whom it is laid.<sup>4</sup> Since the object is to obtain a peremptory writ of *mandamus* as the result of the proceedings, the petition or motion should ask for it, though it is for the court to say whether it will grant an order to show cause why the writ should not issue, or an alternative writ, or a peremptory writ, or will dismiss the proceedings.<sup>5</sup>

§ 250. **When the court will grant the alternative writ or motion to show cause.**— When the petition is heard by the court *ex parte*, if a *prima facie* case calling for the exercise of the extraordinary jurisdiction of the court by *mandamus* is shown,<sup>6</sup> or even if it is not clear that the petitioner is not entitled to the relief asked, or even if the court is in doubt as to whether a writ lies in such a case,<sup>7</sup> a rule to show cause why the writ should not issue, or an alternative writ, will be granted, so that the matter may be fully considered and determined when all interests are represented before the court.<sup>8</sup> It is discretionary with the court as to

<sup>1</sup> Taylor, *Ex parte*, 14 How. 3; W. Va. 595. A *prima facie* case Secombe, *Ex parte*, 19 How. 9; must be presented. State v. Helmer, 10 Neb. 25; Com. v. Allegheny State v. Cincinnati (City), 19 Ohio, 178; People v. Pearson, 2 Scam. Co. (Com'rs), 37 Pa. St. 277; Loy, 189; Drew v. McLin, 16 Fla. 17. *Ex parte*, 59 Ind. 235.

<sup>2</sup> Fisher v. Charleston (City), 17 W. Va. 595; State v. Lean, 9 Wis. 279; Swan v. Gray, 44 Miss. 393. <sup>7</sup> Chance v. Temple, 1 Iowa, 179; State v. Lean, 9 Wis. 279; Fisher v. Charleston (City), *supra*; State v. Johnson Co. (Board Equal.), 10 Iowa, 157.

<sup>3</sup> Chance v. Temple, 1 Iowa, 179.

<sup>4</sup> Chance v. Temple, *supra*.

<sup>5</sup> Schend v. St. George's, etc. Soc., 49 Wis. 237; Babcock v. Goodrich, 47 Cal. 488.

<sup>6</sup> Fisher v. Charleston (City), 17

<sup>8</sup> State v. Lean, 9 Wis. 279; State v. Johnson Co. (Board Equal.), 10 Iowa, 157.

which order it will grant, and it may grant an alternative writ in the first instance if it deems it more conducive to public justice, and to prevent delays.<sup>1</sup> The English practice is to first grant the order to show cause, at a designated time, why the writ should not issue;<sup>2</sup> and in America it has been issued to judges, apparently out of deference, since their office carries a strong presumption in favor of the propriety of their action; but such an order is often regarded as useless and as merely occasioning delay,<sup>3</sup> and in America the preferable practice seems to be to dispense with the rule to show cause and to issue the alternative writ in the first instance.<sup>4</sup>

**§ 251. When a court will issue a peremptory writ without any notice to the respondent.**—When the court grants an order to show cause why a writ of *mandamus* should not issue, or issues the alternative writ, it always fixes the time whereat the respondent is required to make a return showing his obedience to the writ or his reasons for not obeying, so that he may have sufficient time wherein to prepare his defense.<sup>5</sup> Justice requires that one should have notice and an opportunity to be heard before a peremptory *mandamus* is awarded against him.<sup>6</sup> It must be an extreme case, or one that from its nature admits of no excuse, which will induce a court to issue a peremptory writ of *mandamus* without any notice to the relators.<sup>7</sup> Where a jailer held the body of a deceased prisoner for some money due him and for articles supplied, a peremptory *mandamus* was issued in the first instance, without any notice having been given to the jailer, to deliver the body to his executors for the purpose of burial. The court evidently considered that

<sup>1</sup> *Life, etc. Co. v. Adams*, 9 Pet. Wis. 631; *Fisher v. Charleston (City)*, 17 W. Va. 595.

<sup>2</sup> *Fisher v. Charleston (City)*, 17 W. Va. 628.

<sup>3</sup> *Fisher v. Charleston (City)*, *supra*; *State v. Delafield (Sup'rs)*, 64 Wis. 218.

<sup>4</sup> *State v. Joint School Dist.*, 65

<sup>5</sup> *Lutterloh v. Cumberland Co. (Com'rs)*, 65 N. C. 403.

<sup>6</sup> *Armijo v. Territory*, 1 N. Mex. 580.

<sup>7</sup> *Chance v. Temple*, 1 Iowa, 179; *Attala Co. (Bd. Police) v. Grant*, 9 Sm. & Mar. 77.

sanitary laws, as well as decency, required that the remains should be interred. The judge stated that it was not necessary to await a return, and that the respondent, if he had a defense, could show cause why an attachment should not issue.<sup>1</sup> A peremptory *mandamus* was granted without notice to compel a clerk to record a deed, who had refused to do so on the ground that the acknowledgment did not justify its being recorded, after the court had satisfied itself by an inspection of the validity of the acknowledgment, upon the suggestion that another deed might obtain a prior record, if a delay should arise from awarding an alternative writ.<sup>2</sup> Where a peremptory writ was granted without any notice to the respondents, and there were certain matters of fact to be determined by the respondents before they took any action, the proceedings were reversed in the appellate court because the respondents had received no notice.<sup>3</sup>

**§ 252. Action of the court on the hearing of the motion to show cause.**—In case the court issues an order to the parties complained of to show cause on a designated day why the writ described should not be issued, the question will be discussed on the hearing upon the original papers on which the order was obtained, and upon the opposing affidavits, in case the parties complained of (the respondents) show cause against the application.<sup>4</sup> If the cause shown presents an issue of fact, the court should not try such issue on affidavits, but should award an alternative writ, that after a return the issue may be tried regularly as provided by statute or by rules;<sup>5</sup> if, however, there is no dispute about the facts, and the application is well founded in law, and the respondent was heard in opposition to the application, the peremptory *mandamus* may be granted at once.<sup>6</sup>

<sup>1</sup> Q. v. Fox, 2 A. & E. (N. S.) 246.

<sup>2</sup> Goodell, Ex parte, 14 John. 325.

<sup>3</sup> State v. Scott Co. (Com'rs), 42 Minn. 284.

<sup>4</sup> Commercial B'k v. Canal Com'rs, 10 Wend. 25; Q. v. Registrar, 21 Q. B. D. 131; People v. La Grange (Town Bd.), 2 Mich. 187.

<sup>5</sup> Schend v. St. George's Soc., 49 Wis. 237; Fisher v. Charleston (City), 17 W. Va. 595; State v. Delafield (Bd. Sup'rs), 64 Wis. 218.

<sup>6</sup> Schend v. St. George's Soc., 49 Wis. 237; People v. Barton (Ass'rs), 44 Barb. 148; Knox Co. (Bd. Com'rs) v. Aspinwall, 24 How.

Other courts will only take such action in remarkably clear cases,<sup>1</sup> or when the furtherance of justice requires prompt and immediate action.<sup>2</sup> Where the notice of the application for the writ, directed to the judge of a court, was served on the opposite party and on the judge, and the law was plain, the peremptory writ was issued in the first instance.<sup>3</sup> If the respondent fails to show cause under the rule, or makes an insufficient answer, the custom in West Virginia is to enlarge the rule, compel an answer, or issue an alternative or a peremptory writ.<sup>4</sup> If it appears upon examination that the petitioner has no merit in his application, the rule or writ will be refused, and the proceedings will be dismissed.<sup>5</sup>

**§ 253. The alternative writ becomes the first pleading in the cause.**—When the court orders an alternative writ of *mandamus* to issue, such writ becomes the primary pleading in the cause. It corresponds to the complaint or petition in an ordinary action at law, and the return of the respondent is regarded as an answer in a similar proceeding.<sup>6</sup> The petition and affidavits, on which the writ was obtained, form no part of the record;<sup>7</sup> nor can they be used to sustain or supplement the allegations contained in the writ.<sup>8</sup>

376; *State v. Patterson (Mayor)*, 35 N. J. L. 196; *State v. Camden (City Coun.)*, 39 N. J. L. 620; *Luttreloh v. Cumberland Co. (Com'rs)*, 65 N. C. 403; *State v. Hudson Co. (Bd. Freeholders)*, 35 N. J. L. 269.

<sup>1</sup> *Attala Co. (Bd. Police) v. Grant*, 9 S. & M. 77.

<sup>2</sup> *White River Bank, In re*, 23 Vt. 478.

<sup>3</sup> *People v. Pearson*, 1 Scam. 458.

<sup>4</sup> *Fisher v. Charleston (City)*, 17 W. Va. 595.

<sup>5</sup> *People v. Thistlewood*, 103 Ill. 139.

<sup>6</sup> *Silver v. People*, 45 Ill. 224; *People v. Hamilton Co.*, 3 Neb. 244; *Johnson v. Smith*, 64 Ind. 275;

*People v. Chicago (Mayor)*, 51 Ill. 17; *State v. Union Township*, 9 Ohio St. 599; *People v. Sullivan Co. (Sup'rs)*, 56 N. Y. 249; *State v. Sheridan*, 43 N. J. L. 82; *Wheeler v. Northern C. I. Co.*, 10 Colo. 582; *Crans v. Francis*, 24 Kans. 750; *Long v. State*, 17 Neb. 60; *State v. Sup'rs (Bd.)*, 64 Wis. 218; *State v. Burnsville T. Co.*, 97 Ind. 416; *Lyman v. Martin*, 2 Utah, 136; *Hambleton v. Dexter (Town)*, 89 Mo. 188.

<sup>7</sup> *State v. Sheridan*, 43 N. J. L. 82; *Hardee v. Gibbs*, 50 Miss. 802; *People v. Sullivan Co. (Sup'rs)*, 56 N. Y. 249.

<sup>8</sup> *State v. Sheridan, supra*; *Fisher v. Charleston (City)*, 17 W. Va. 595;

§ 254. **Particularity of statement required in the alternative writ.**—At one time the greatest particularity and completeness of statement was required in pleadings in a *mandamus* proceeding; but the extraordinary strictness of statement formerly required under the common law is not considered to be applicable to this country.<sup>1</sup> It has been held that the alternative writ should anticipate and answer every possible objection which it may be expected will be urged against the claim,<sup>2</sup> but such certainty as is required in a declaration in a common-law suit is generally held to be sufficient.<sup>3</sup> The statements may be informal, but whatever is essential to good pleading in an ordinary action must be contained in substance therein.<sup>4</sup> Certainty to a common intent is now considered sufficient for the petition or writ, and answer, stated in such manner that the ordinary mind, disregarding technicality in pleading, may easily apprehend it.<sup>5</sup> It has even been held that the right of the petitioner and the duty of the respondent may be stated in general terms.<sup>6</sup>

§ 255. **Subject continued.**—The alternative writ must aver all the facts necessary to give the petitioner the right which he claims,<sup>7</sup> and to justify the order sought.<sup>8</sup> The petitioner must show clearly his interest in the matter which he presents as the ground of his application.<sup>9</sup> Whatever is required to be done by him as a condition precedent to the right demanded must be shown affirmatively to have been performed by him,<sup>10</sup> and the manner of such perform-

Fisher v. Charleston (Mayor), 17 W. Va. 628; McKenzie v. Ruth, 22 Ohio St. 371.

<sup>1</sup> State v. Lusitanian P. Soc., 15 La. An. 73.

<sup>2</sup> Houston, etc. R. R. Co. v. Randolph, 24 Tex. 317; Arberry v. Beavers, 6 Tex. 457; Hoxie v. Somerset Co. (Com'rs), 25 Me. 333; Harkins v. Sencerbox, 2 Minn. 344.

<sup>3</sup> Fisher v. Charleston (Mayor), 17 W. Va. 628.

<sup>4</sup> State v. Sheridan, 43 N. J. L. 82.

<sup>5</sup> Central, etc. Co. v. Com., 114 Pa. St. 592.

<sup>6</sup> Kidder v. Morse, 26 Vt. 74.

<sup>7</sup> Withers v. State, 36 Ala. 252.

<sup>8</sup> McKenzie v. Ruth, 22 Ohio St. 371; State v. Stearns, 11 Neb. 104.

<sup>9</sup> Fleming, Ex parte, 2 Wall. 759; State v. Davis Co. (Judge), 2 Iowa, 280.

<sup>10</sup> People v. Hayt, 66 N. Y. 606.



ance must be stated.<sup>1</sup> The facts must also be set forth which clearly impose on the respondent the duty which it is sought to compel him to perform,<sup>2</sup> and show that the act sought is not in excess of his legal obligation,<sup>3</sup> and that he still has the power to do it.<sup>4</sup> The allegations of fact must be so positive that an indictment for perjury may be sustained on them if they are not correct.<sup>5</sup> The writ should show that the relator has a legal right to have the act done which is sought, that it is the plain duty of the respondent to perform such act without any discretion as to doing or declining, that the *mandamus* will be efficient as a remedy, and that the relator has no other plain, speedy and adequate remedy.<sup>6</sup> Every material fact on which the relator relies must be set forth distinctly,<sup>7</sup> unreservedly, fully and clearly.<sup>8</sup> All the facts, including the particulars thereof, which give the right to the relator and impose the duty on the respondent, and show the default of the latter, must be set forth in an issuable form, so that they may be admitted or traversed.<sup>9</sup> A deficiency in the allegations made by the relator cannot be supplied by matter appearing in the return.<sup>10</sup> The relator must show a good case on the face of the petition.<sup>11</sup> A party, who admits that he is not entitled to the sum of money specified in the contract, but claims

<sup>1</sup> *People v. Glann*, 70 Ill. 232.

<sup>2</sup> *Kemerer v. State*, 7 Neb. 130.

<sup>3</sup> *People v. Dutchess*, etc. R. R., 58 N. Y. 152; *Reg. v. Tithe Com'rs*, 19 L. J. Q. B. 177; *People v. Baker*, 35 Barb. 105.

<sup>4</sup> *People v. Hayt*, 66 N. Y. 606.

<sup>5</sup> *Chance v. Temple*, 1 Iowa, 179; *Fisher v. Charleston (City)*, 17 W. Va. 595.

<sup>6</sup> *Daniels v. Miller*, 8 Colo. 542.

<sup>7</sup> *Lavelle v. Soucy*, 96 Ill. 467.

<sup>8</sup> *Houston, etc. R. R. v. Randolph*, 24 Tex. 317; *Hardee v. Gibbs*, 50 Miss. 802; *State Board Educ. v. West Point*, 50 Miss. 638.

<sup>9</sup> *State v. Sheridan*, 43 N. J. L. 82;

*People v. Westchester*, 15 Barb. 607; *Hambleton v. Dexter (Town)*, 89 Mo. 188; *Lavelle v. Soucy*, 96 Ill. 467; *People v. Glann*, 70 Ill. 232; *Commercial Bank v. Canal Com'rs*, 10 Wend. 25; *People v. Davis*, 93 Ill. 133; *State v. Everett*, 52 Mo. 89; *Chance v. Temple*, 1 Iowa, 179; *Canal (Bd. Trustees) v. People*, 12 Ill. 248; *State v. Governor*, 39 Mo. 388; *People v. Ransom*, 2 N. Y. 490; *Houston, etc. R. R. v. Randolph*, 24 Tex. 317.

<sup>10</sup> *Q. v. Hopkins*, 1 Ad. & E. (N. S.) 161.

<sup>11</sup> *Swanbeck v. People*, 15 Colo. 64.

under a *quantum meruit*, cannot seek payment by means of a *mandamus*, since the writ only lies for a specific legal right, and a party cannot thereby recover damages and have a writ of inquiry, as upon a *quantum meruit*.<sup>1</sup> The petitioner is not required to contest his rights against third persons, and his allegations and the investigation should be limited to such facts as are necessary to determine the rights of the parties properly before the court.<sup>2</sup>

§ 256. Illustrations of the particularity required in the writ.—Where a *mandamus* was asked to compel a sheriff to make a deed for property sold by him on execution, it was considered necessary to allege the facts which showed that the sale was in accordance with the law.<sup>3</sup> In pleading a bond it is not sufficient to say it was a good bond under the law, but it must be set out, or there must be distinct averments showing that it complies with the law.<sup>4</sup> An alternative writ of *mandamus* to compel the issuance of a dram-shop license must state the facts showing compliance with the municipal ordinance and the statute.<sup>5</sup> When a *mandamus* is sought to compel the state treasurer to pay a warrant of the auditor, the allegation that there was sufficient money in the treasury applicable thereto when it was drawn is not sufficient, but an allegation is necessary that there was sufficient money there to pay it when it was presented.<sup>6</sup> When an application is made to restore a justice of the county court who has been removed from office by that court, the alternative writ must show that the relator was a justice and has the constitutional and legal right to exercise all the duties of the office.<sup>7</sup> When, however, a legal liability has been judicially ascertained, it is sufficient to so state, and it is not necessary to allege the circumstances out of which it grew.<sup>8</sup> When the law does

<sup>1</sup> Tucker v. Iredell, 1 Jones, 451.

<sup>6</sup> Huff v. Kimball, 39 Ind. 411.

<sup>2</sup> State v. Wright, 10 Nev. 167.

<sup>7</sup> Spencer Co. (Just.) v. Harcourt,

<sup>3</sup> Winters v. Burford, 6 Cold. 328.

4 B. Mon. 499.

<sup>4</sup> People v. Crotty (Village), 93 Ill. 180.

<sup>8</sup> School Dist. v. Lauderbaugh, 80 Mo. 190.

<sup>5</sup> State v. Hudson, 13 Mo. Ap. 61.

not allow a warrant to be drawn, unless there exists an unexhausted fund specifically appropriated to meet it, the writ must allege that there is money on hand, not otherwise appropriated by law, out of which it can be paid.<sup>1</sup> An application to compel the commissioners of highways to take proper steps to open a highway must so describe the road that it may be found by the description.<sup>2</sup> When a party has an option to do one of two things, a *mandamus* to compel him to do one is defective, unless it shows the impossibility of exercising the option.<sup>3</sup> A petition or an alternative writ of *mandamus*, calling on the respondents to pay to the relator the amount due to him under a certain contract, without specifying such amount, is defective. The reason assigned is that the court cannot make a proper order.<sup>4</sup>

**§ 257. The alternative writ must show that the proper demand of performance was made, or the facts rendering a demand unnecessary.**—Since this writ never issues against a party unless he is in default, it must clearly appear by the allegations of the petition or writ that a demand has been made on him to fulfill his duty and perform the act desired.<sup>5</sup> But it is not always necessary to allege

<sup>1</sup> Redding v. Bell, 4 Cal. 333.

<sup>2</sup> People v. Davis, 93 Ill. 133.

<sup>3</sup> Reg. v. South East. R. R., 25 Eng. L. & E. 13; 4 H. L. C. 471.

<sup>4</sup> McCoy v. Harnett Co. (Just.), 5 Jones, 265. If this decision means that the exact amount claimed must in all cases be stated, it would in many cases defeat the object of the writ. When a *mandamus* is sought to compel a tax collector to pay over the proceeds of a certain tax, it is generally impossible to ascertain the sum collected, and the claim for an amount in excess of the collections will defeat the writ. The disclosure of the proper sum upon the incoming of the respond-

ent's return might enable the relator to dismiss the writ and begin anew, but the law should not require such unnecessary proceedings. Where the writ alleged that the respondent had collected about \$25,000, and he returned that he did not know how much money he had on hand, the court stated that it was his business to know, and that he must inform himself at his peril. A peremptory writ was issued to pay over the actual balance in his hands. State v. Dougherty, 45 Mo. 294.

<sup>5</sup> Chance v. Temple, 1 Iowa, 179; People v. Hyde Park, 117 Ill. 462; Hardee v. Gibbs, 50 Miss. 802.

or prove a personal demand. When the law imposes a positive and well-defined duty of a public nature upon public officers affecting public interests, the law stands for a continuous demand;<sup>1</sup> but all the facts must be set forth which are necessary to show such dereliction or omission of duty.<sup>2</sup> Where a statute peremptorily required the erection of a house of correction, a failure to take any action in the matter for twelve years dispensed with the necessity of a demand.<sup>3</sup> So acts and declarations, if shown in the petition or alternative writ, amounting to a refusal, and showing that a refusal would have followed a demand, dispense with necessity of a demand, since the law does not exact the performance of vain things.<sup>4</sup> An averment, that the councils of a city have refused to make any provision for the payment of interest on its bonds, dispenses with the necessity of alleging a demand to levy a tax in proceedings by *mandamus* to compel the levying and collecting of a tax for that purpose.<sup>5</sup> When an averment of a demand is necessary, the lack of such averment is fatal, even though the trial court may find such a request and refusal.<sup>6</sup> Where a demand was accompanied with an improper requirement, the latter, it was held, might be rejected as surplusage.<sup>7</sup> A demand to levy a tax, which did not show the amount of the liability, was held to be insufficient.<sup>8</sup> When a demand is necessary, the fact that it was made must be alleged with precision.<sup>9</sup>

**§ 258. A refusal by the respondent to act must be alleged in the alternative writ, or the facts equivalent to a refusal.**—It must appear by the allegations of the petition

<sup>1</sup> Lee Co. v. State, 36 Ark. 276.

<sup>6</sup> Douglas v. Chatham (Town), 41

<sup>2</sup> State v. Gracey, 11 Nev. 223; Conn. 211.

Ohio v. Moore, 39 Ohio St. 486.

<sup>7</sup> Q. v. St. Margaret (Select Vestry), 8 A. & E. 889.

<sup>3</sup> Com. v. Hampden (Just.), 2 Pick. 414.

<sup>8</sup> Tallapoosa (Com'rs Court) v.

<sup>4</sup> Com. v. Allegheny (Com'rs), 37 Pa. St. 277.

Tarver, 21 Ala. 661.

<sup>5</sup> Com. v. Pittsburgh (Sel. Com.), 34 Pa. St. 496.

<sup>9</sup> Ingerman v. State (Ind., May 1, 1891), 27 N. E. Rep. 499.

or alternative writ, that the party complained of refused or failed to comply with the demand to fulfill his duty.<sup>1</sup> It is not necessary to allege a direct refusal to comply in case such facts are alleged as are equivalent thereto. Of course where a demand may be dispensed with, so may a refusal, but the facts must be stated which render such demand unnecessary.<sup>2</sup> Where a vestry adjourned from time to time without complying with the demand, as the previous vestry had done, and they did not satisfactorily deny the charge that they purposely so adjourned with the object of not complying, the court considered their action to be equivalent to a refusal.<sup>3</sup>

**§ 259. The alternative writ must show that the relator has no legal remedy except the writ of mandamus.**—The petition or alternative writ must show that the petitioner has no legal remedy except the writ of *mandamus*. An averment that the petitioner cannot have adequate relief without the aid of *mandamus* is sufficient.<sup>4</sup> Though it is customary to make such an allegation,<sup>5</sup> yet it suffices that the facts alleged show that the relator has no other adequate legal remedy.<sup>6</sup>

**§ 260. Particularity required in the mandatory clause of the alternative writ.**—After the facts have been stated, a mandatory clause must be added to the petition or alternative writ, specifying the duty required of the party against whom complaint is made, and praying an order of the court requiring him to discharge such duty. This mandatory

<sup>1</sup> Hardee v. Gibbs, 50 Miss. 802.

<sup>2</sup> *Ante*, § 257.

<sup>3</sup> Q. v. St. Margaret (Sel. Vestry), 8 A. & E. 889. The objection that no refusal was alleged was disregarded, because it was not taken at the outset of the argument on showing cause against the issuance of the writ. Q. v. Gamble, 3 Per. & Dav. 122, note d.

<sup>4</sup> Com. v. Pittsburgh, 34 Pa. St. 496.

<sup>5</sup> Lutterloh v. Cumberland Co. (Com'rs), 65 N. C. 403; School Insp. v. State, 20 Ill. 525; Rex v. Overseers Shipton Mallet, 5 Mod. R. 420. It has been held not to be proper to make the allegation. State v. Jones, 1 Ired. 129.

<sup>6</sup> State v. Goll, 32 N. J. L. 285; People v. Hilliard, 29 Ill. 413; State v. Jones, 1 Ired. 129; State v. Governor, 39 Mo. 383.

clause should, like the body of the petition or alternative writ, state the acts demanded from the respondent in terms so specific as to show the precise acts required, and with great certainty should call his attention thereto.<sup>1</sup> The greatest care is required in framing this mandatory clause, since the peremptory writ must strictly conform to the mandatory clause of the alternative writ, and be enforced in its terms or not at all.<sup>2</sup> The range of action required of the respondent cannot be left to indiscriminate outside ascertainment;<sup>3</sup> nor can he be required to look *dehors* the writ to ascertain his duty, and therefore a mandate to him to assess property "according to law" is erroneous.<sup>4</sup> If the mandatory part of the writ is larger than is warranted by the recitals of the writ or by the statute,<sup>5</sup> or if it demands two or more acts, one of which cannot be legally required,<sup>6</sup> the writ is bad on demurrer or may be quashed. So a *mandamus* to city officers, and to those persons afterwards elected such, to fill the vacancies in certain offices, is bad, because parties not yet elected to office owe no duties to others as such officers.<sup>7</sup> An alternative writ of *mandamus* calling upon the public authorities to pay a judgment, issue bonds, or levy a tax to pay the same, was quashed, because it failed to state the precise duty required. An order in the alternative was not considered to conform to the rule that the mandatory clause must clearly and expressly state the precise thing desired.<sup>8</sup> For the same reason a mandatory clause requiring the trustees of a town to pay certain warrants, or levy a tax for their payment, was considered to be erroneous.<sup>9</sup> Such decisions seem to be ad-

<sup>1</sup> People v. Brooks, 57 Ill. 142;  
State v. Mobile, etc. R. R., 59 Ala.  
321.

<sup>2</sup> King v. St. Pancras, 1 N. & P.  
507.

<sup>3</sup> Cross v. West Va. etc. R. R., 34  
W. Va. 742.

<sup>4</sup> Hartshorn v. Ellsworth (Asses.),  
60 Me. 276.

<sup>5</sup> King v. St. Pancras, 1 N. & P.  
507.

<sup>6</sup> State v. Grubb, 85 Ind. 213.

<sup>7</sup> United States v. Elizabeth (City),  
42 Fed. R. 45.

<sup>8</sup> State v. Milwaukee (City), 22  
Wis. 397.

<sup>9</sup> State v. Pacific (Town Trustees),  
61 Mo. 155.

hering to a general rule at the expense of justice. A third party seldom knows the exact condition of a public treasury, and his peremptory writ is not granted unless it is necessary to obtain the object desired. A writ, commanding the payment of his claim, will be finally overruled if it appears there is no money in the treasury. So a writ requiring the levy of a tax will be refused if it is unnecessary by reason of the supply of money in the treasury. Possibly after the facts are developed by the return or on the trial, an amendment may be allowed to the writ, but the relator should not be required to rely on an amendment, and all courts do not allow material amendments to be made. It would seem proper in such cases to permit the mandatory clause to require the payment of the claim from moneys in the treasury, or, in case of a deficiency of such money, to levy a tax to pay it.<sup>1</sup> Where several acts are to be done, the mandatory clause may be general in its terms when otherwise great prolixity would be required.<sup>2</sup>

**§ 261. Documents of importance in the case should accompany a petition for a mandamus.**—To the petition for a *mandamus* should be annexed all documents of importance in the matters involved.<sup>3</sup> All record evidence, as the proceedings of court, should be brought before the court as exhibits in the shape of certified copies, or authenticated in some way,<sup>4</sup> rather than by bare recitals in the affidavit or petition.<sup>5</sup> To an application for a *mandamus* to an officer of a parish to deliver up all the books in his possession belonging to a parish, because of his conviction of a crime, a certified copy of the record of such conviction should be annexed, that the court may see whether the conviction was

<sup>1</sup> *Ralls Co. Court v. United States*, 105 U. S. 733. *People v. Pearson*, 2 Scam. 189; *Secombe, Ex parte*, 19 How. 9;

<sup>2</sup> *Q. v. Southampton (Com'rs of Port)*, L. R. 4 Eng. & Irish Ap. 449. *Poultney v. La Fayette (City)*, 12 Pet. 472; *Kleiber v. McManus*, 66

<sup>3</sup> *Babcock v. Goodrich*, 47 Cal. 488. *Tex.* 48.

<sup>5</sup> *Hewitt v. Judge of Probate*, 67

<sup>4</sup> *Postmaster Gen. v. Trigg*, 11 Pet. 173; *Taylor, Ex parte*, 14 How. 3;

*Mich.* 1.

proper and before parties competent to decide.<sup>1</sup> Where, however, it was sought to compel the steward of the lord of a manor to enroll a deed, it was not considered necessary to annex a copy of the deed, when the contents of the deed had been stated in the affidavit.<sup>2</sup> In proceedings to compel the restoration of parties, claimed to have been wrongfully expelled from membership in private corporations, it is usual to annex to the application or to the return copies of the charters and by-laws of such corporations.<sup>3</sup> When a writ of *mandamus* is applied for to compel a judge to sign a bill of exceptions, such bill should accompany the application.<sup>4</sup>

**§ 262. The alternative writ should conform to the petition.**—The various allegations mentioned must be found in the alternative writ; but if a petition is presented in order to obtain the writ, they must also appear in the petition. The court grants the alternative writ upon the showing made in the petition, and the writ should set forth all the matters constituting such showing.<sup>5</sup> The material parts of the petition are the facts which are sworn to, and the court issues the alternative writ of *mandamus* for what the party, by the showing of his affidavit, is entitled to, regardless of the prayer contained therein. So far as the relief is concerned, the court will in its order mould the alternative writ.<sup>6</sup> A variance in substance in the alternative writ from the order of the court, changing the character of the act to be done, or omitting any material fact contained in the petition, is fatal to the proceedings, and will cause the writ to be quashed.<sup>7</sup> It often occurs that by stat-

<sup>1</sup> *Rex v. Simms*, 4 Dowl. 294.

<sup>2</sup> *Crosby v. Fortescue*, 5 Dowl. 273.

<sup>3</sup> *Evans v. Philadelphia Club*, 50 Pa. St. 107; *Med. etc. Soc. v. Weatherly*, 75 Ala. 248; *Com. v. Pike B. Soc.*, 8 Watts & S. 247.

<sup>4</sup> See § 190.

<sup>5</sup> *State v. State Board of Health*, 103 Mo. 22.

<sup>6</sup> *Fisher v. Charleston (Mayor)*, 17

W. Va. 628; *People v. Norstrand*, 46 N. Y. 375; *King v. Leicester (Just.)*, 4 B. & C. 891; *Hartshorn v. Ellsworth (Assessors)*, 60 Me. 276; *State v. Beloit (Sup'rs)*, 20 Wis. 79; *King v. St. Pancras (Ch. Trustees)*, 3 A. & E. 535.

<sup>7</sup> *Hawkins v. More*, 3 Ark. 345; *State v. Casey (N. Dak., June 16, 1891)*, 49 N. W. Rep. 164.



ute,<sup>1</sup> custom,<sup>2</sup> order of court,<sup>3</sup> or consent of parties, the issue of the alternative writ may be waived,<sup>4</sup> and the petition or affidavit treated as such. In such cases the petition or affidavit becomes the alternative writ, and is subject to the rules of pleading which apply to alternative writs of *mandamus*.

**§ 263. Mode of setting out the facts in the alternative writ.**—The alternative writ is merely an order of court. After setting out the allegations which are contained in the petition or affidavit, it orders the parties complained of to perform the acts desired, or to show the court at a time designated in the order why they have not done so. The allegations of the petition are generally alleged in the alternative writ by way of recital, as: whereas it is recited that A. has, etc.,<sup>5</sup> or A. of full age, being duly sworn, now here causes the court to be informed, etc.<sup>6</sup> Great care must be exercised in preparing the alternative writ. In England the counsel for the petitioner prepares it; and here the counsel have been required to draft it and submit it to the court before it was issued.<sup>7</sup> The practice is not uniform. In one state the writ contains only the order, but a copy of the petition is served with it.<sup>8</sup> When there is no agreement to dispense with the alternative writ,<sup>9</sup> the writer believes the last mentioned practice to be commendable. He would, however, recommend, as is done in some courts, that the writ set out that on a certain date a certain paper was filed in that court, setting out the petition verbatim, including the jurat, and adding that the court, after due con-

<sup>1</sup> *People v. Weber*, 86 Ill. 283; *People v. Davis*, 93 Ill. 133.

<sup>2</sup> *Texas M. R. R. v. Locke*, 63 Tex. 623.

<sup>3</sup> *Schend v. St. George's Soc.*, 49 Wis. 237; *People v. La Grange* (Town Board), 2 Mich. 187.

<sup>4</sup> *Davis v. Carter*, 18 Tex. 400; *People v. Scates*, 3 Scam. 351; *Pfif-*

*ter v. State*, 82 Ind. 382; *McCrary v. Beaudry*, 67 Cal. 120.

<sup>5</sup> *Fisher v. Charleston* (Mayor), 17 W. Va. 628.

<sup>6</sup> *Chance v. Temple*, 1 Iowa, 179.

<sup>7</sup> *Johnes v. Auditor of State*, 4 Ohio St. 493.

<sup>8</sup> *McCoy v. Harnett Co. (Just.)*, 4 Jones, 180.

<sup>9</sup> *Ante*, § 262.

sideration, ordered the respondents to do a certain act, here setting out the mandatory clause of the petition, or that they on a day designated show cause why they have not done so.<sup>1</sup>

§ 264. **The manner in which mandamus proceedings are entitled.**—Since the *mandamus* proceeding is an order from the sovereign authority commanding a certain party to do a certain act of a public nature which the aggrieved party cannot enforce by the ordinary process of law, and wherein the sovereign authority interposes to prevent a failure of justice, the proceeding was considered to be a prerogative writ, and to be really a proceeding prosecuted by such sovereign power. It was accordingly held, that the proceedings should be entitled in the name of the sovereign power, but the name of the party instituting the proceedings was added as the relator. The parties against whom the writ was sought were known as the respondents. Though the practice is almost universal of entitling the proceedings in the name of the sovereign power,<sup>2</sup> yet the writ is now shorn of its prerogative features and is in substance a civil remedy, and though the name of the sovereign power is still used, yet such use is merely nominal and there is no longer any reason therefor.<sup>3</sup> So soon as the proceedings are instituted, which is as soon as the court issues any order therein, all papers and pleadings therein must be properly entitled by the name of the plaintiff and respondents. Whether the petition and affidavits upon which the first application is made to the court should be entitled has already been considered.<sup>4</sup>

§ 265. **When there is an informality in the alternative writ an alias may issue.**—Where there has been an infor-

<sup>1</sup> See § 319.

<sup>3</sup> State v. Lewis, 76 Mo. 370; State

<sup>2</sup> Chumasero v. Potts, 2 Mont. 242; v. Madison Co. (Com'rs), 92 Ind. Territory v. Potts, 3 Mont. 364; 183; State v. Jennings, 56 Wis. 113; Chance v. Temple, 1 Iowa, 179; Run- Brower v. O'Brien, 2 Ind. 423; Run- ion v. Latimer, 6 S. C. 126; State ion v. Latimer, 6 S. C. 126. v. Cole, 33 La. An. 1356. For the

<sup>4</sup> Ante, § 247.

exceptions see ante, § 228.

mality in the alternative writ as issued, such as the omission of the clause to show cause why the writ should not be obeyed, or that it was made returnable at an earlier period than was allowed by the rules of court, an *alias* writ properly corrected has been granted at once.<sup>1</sup>

§ 266. **Proceedings when no return is made to the alternative writ.**—If the party complained of fails to make a return to the alternative writ, and simply ignores it, the court may issue an attachment against him to compel him to make a return;<sup>2</sup> but in earlier times the attachment was not granted without a peremptory rule to return the writ, and then the attachment went for the contempt in not obeying such rule.<sup>3</sup> In a case wherein it appeared that the alternative writ did not contain the clause to show cause why the writ was not obeyed, the court discharged the rule to show cause why an attachment should not issue for not making a return to an *alias mandamus*, and granted a *pluries* writ containing the omitted clause, and gave the respondent time to make his return.<sup>4</sup> The court may at its discretion, unless there is some statute to the contrary,<sup>5</sup> issue a peremptory writ of *mandamus* upon a default on the part of the respondents in making a return to the alternative writ,<sup>6</sup> and the facts stated in the alternative writ may be taken to be true.<sup>7</sup> The peremptory writ has been granted where the return consisted merely of an argument against the authority of the court to issue the writ.<sup>8</sup> The courts are, however, reluctant to issue the writ on a default,<sup>9</sup> and will refuse it in a case involving public interests, upon

<sup>1</sup> London v. Swallow, 2 Keb. 76; King v. St. Andrew (Gov'rs of Poor), 7 A. & E. 281; King and Owen, Skin. 669.

<sup>2</sup> King v. Esham, 2 Barn. 265; United States v. Lee Co. (Sup'rs), 2 Biss. 77; Rex v. Rye (Mayor), Burr. 798; State v. Baird, 11 Wis. 260.

<sup>3</sup> Coventry (Mayor), Case of, 2 Salk. 429.

<sup>4</sup> King and Owen, Skin. 669.

<sup>5</sup> People v. Central P. R. R., 62 Cal. 506.

<sup>6</sup> People v. Pearson, 3 Scam. 270; People v. Ulster Co. (Judges), 1 John. 64; State v. Jones, 1 Ired. 129; Fisher v. Charleston (City), 17 W. Va. 595.

<sup>7</sup> State v. Gandy, 12 Neb. 232.

<sup>8</sup> People v. Pearson, 2 Scam. 189.

<sup>9</sup> State v. Baird, 11 Wis. 260.

the failure of a public officer to interpose matters of defense, when substantial proof of the relator's right is wanting.<sup>1</sup>

§ 267. **A return of obedience to the alternative writ.**—After the alternative writ is issued the relator can obey the writ, and can comply with the order therein contained and make a return stating such obedience, or he may move to quash the writ or may demur to it, or make a return, denying the facts stated therein or setting up new matter constituting a defense.<sup>2</sup> If the respondent elects to obey the writ, his return should show clearly his compliance by following the mandatory clause of the writ and stating his performance of the duty as by the writ commanded.<sup>3</sup> The respondent may, on the other hand, return obedience to a part of the alternative writ, and give his reasons for refusing to obey the rest of it.<sup>4</sup> It may be that the respondent returns obedience to the writ, but the relator asserts that such return is not true or is a mere evasion. In such cases the relator is allowed by plea to traverse a return of unconditional compliance with the writ.<sup>5</sup>

§ 268. **The early practice in mandamus proceedings.**—Before proceeding to consider the present practice in such matters it will be well to call attention to the old practice. The practice in *mandamus* proceedings has changed very much since the adoption of the statute of 9 Anne, chapter 20, though at first the English courts claimed that it made but little difference, save that it conferred the right to traverse the allegations of the return, and, as a consequence, gave a trial of the disputed matters of fact; but they and the American courts have more and more assimilated the proceedings in the case of a *mandamus* to those of an ordinary action at law, and whereas any error was fatal and any decision of a legal question was final, now the

<sup>1</sup> *Arberry v. Beavers*, 6 Tex. 457.

<sup>4</sup> *King v. Staffordshire (Just.)*, 6

<sup>2</sup> *Swan v. Gray*, 44 Miss. 393;

A. & E. 84.

*Newman, Ex parte*, 81 U. S. 152.

<sup>5</sup> *Q. v. Pirehill North (Just.)*, 13 Q. B. D. 696; 14 Q. B. D. 13; *Q. v. King*, 20 Q. B. D. 430.

<sup>3</sup> *State v. Williams*, 69 Ala. 311.

courts allow amendments to be made, and traverses to be filed after the overruling of demurrers and motions to quash, very much as in any suit at law. We will first state the old practice, which has been modified from time to time, till its harsh rules have generally been abrogated. If the respondent objected to the legal sufficiency of the writ, he moved to quash it or filed a return, alleging that under the law he was not required to do the act desired by the relator, whereupon a *concilium* was asked for and granted, under which the question was argued and disposed of as though it were a demurrer.<sup>1</sup> If the motion to quash the writ was overruled the writ was made peremptory;<sup>2</sup> and the same rule was enforced, when on a *concilium* the writ was found to be legally sufficient. On the other hand, when the writ was adjudged to be insufficient on a *concilium* or a motion to quash, the proceedings were dismissed. If a return controverting the facts and stating reasons why the respondent had not obeyed the writ was filed, the relator might object thereto by a motion to quash, or he might pray for and obtain a *concilium*, whereupon the question was argued and decided as on a demurrer.<sup>3</sup> The *concilium* was an invention of the courts, because the statute of 9 Anne, chapter 20, which undertook to regulate *mandamus* proceedings, failed to provide for a demurrer to the pleadings above mentioned. There seemed to be a preference for a *concilium*, unless the return was frivolous, contemptuous or manifestly bad on its face, when the motion to quash was used, though it could be used on all occasions if the party so chose.<sup>4</sup> If the return was adjudged to be insufficient, the peremptory writ of *mandamus* was granted at once.<sup>5</sup> If, however, the re-

<sup>1</sup> King v. St. Pancras, 1 N. & P. London (Mayor), 3 B. & Ad. 255; 507; Chance v. Temple, 1 Iowa, 179.

<sup>2</sup> King v. Tucker, 3 B. & C. 544.

<sup>3</sup> Q. v. St. Saviour (Church-wardens), 7 A. & E. 925; Pattison, J., in King v. Oundle (Lord of), 1 A. & E. 283, 299; King v. Ouze Bank Com'rs, 3 Ad. & E. 544; King v.

Pattison, J., in Q. v. Eastern Co. R. R., 10 A. & E. 531, 558.

<sup>4</sup> New Haven, etc. R. R. v. State, 44 Conn. 376; Silverthorne v. Warren R. R., 33 N. J. L. 173.

<sup>5</sup> Buller's Nisi Prius, 197, 198; King v. Oundle (Lord of), 1 Ad. &

lator had questioned the sufficiency of the return by means of a *concilium*, he was not allowed, after the decision was against him in such a proceeding, to traverse the facts stated in the return, for he thereby admitted that upon its face the return was a sufficient answer, and a judgment was rendered for the respondent.<sup>1</sup> The allegations of fact contained in the return could not be traversed, and for this reason, and because the proceeding was intended to be a speedy remedy, the courts required each party to state his claims fully in his pleadings, and allowed no amendments to be made to the pleadings except of the most formal kind,<sup>2</sup> and in overruling any action by either party gave final judgment in favor of the other party. If the relator admitted the return to be good in point of law, but claimed that the statements contained therein were not true, his remedy was to bring an action against the respondents for making a false return. Such action was required to be brought in the same court, namely, in the king's bench. It would not suffice to bring such a suit in the common pleas court.<sup>3</sup> But such action could not be brought till judgment had been entered on the return, since, until it was adjudged that the return was good in law, it did not appear that the relator had suffered any damages by such return.<sup>4</sup> If the relator succeeded in his action for a false return, the court then ordered the issue of the peremptory writ of *mandamus* under his original proceedings.<sup>5</sup> When the respondent was a corporation, the action for a false return, being an action for damages for a wrongful act, could be brought against the whole corporation, or against any particular member

El. 283; Q. v. St. Andrews (Gov.), & Ad. 255; People v. Finger, 24 10 A. & E. 736; R. v. March, 2 Burr. Barb. 341.

999; R. v. Dublin (Dean), 8 Mod. 27; 2 § 293.  
Rex v. Norwich (Dean), Stra. 159; 3 Buller's Nisi Prius, 197, 198.  
Q. v. Poole (Mayor), 1 Q. B. 616; Rex 4 Enfield v. Hills, 2 Lev. 236;  
v. Malden (Corp.), 2 Salk. 431; 1 L. State v. Ryan, 2 Mo. Ap. 303.  
Raym. 481; 3 Stephen's Nisi Prius, 5 Buckley v. Palmer, 2 Salk. 430;  
2328. Swan v. Gray, 44 Miss. 393.

<sup>1</sup> King v. London (Mayor), 3 B.

of it.<sup>1</sup> The act of 9 Anne, chapter 20, allowed the return to be traversed in cases of contests about public offices, and has since been extended to every *mandamus* proceeding. In America, either by statute or by the rulings of the courts, the returns were allowed to be traversed, and it is believed that now in all of the states such practice is admissible. As a consequence the action for a false return has become obsolete, and need be no further considered. As already stated, the practice in a *mandamus* proceeding has changed very much since the statute of 9 Anne, chapter 20, whereby a traverse was allowed to the return in many cases, and pleadings found to be defective are allowed to be amended. We will proceed to consider the pleadings and practice in such cases as now generally adopted.

§ 269. When a motion lies to quash the alternative writ.—A motion to quash the alternative writ of *mandamus* is proper, when it does not disclose a case coming within the legitimate scope of a *mandamus*, or when it is informal or defective by omission of necessary parties or of some material fact.<sup>2</sup> If the facts set forth in the writ do not show a legal title in the relator, such writ may be quashed.<sup>3</sup> A motion to quash the alternative writ is equivalent to a demurrer,<sup>4</sup> and it is a matter of little moment, whether the objections to the writ be urged by demurrer or by a motion to quash.<sup>5</sup> Where the questions involved were very important, it has been considered not proper to decide them on a motion to quash the writ, which was regarded as an informal proceeding, but that they should be presented by plea or demurrer.<sup>6</sup> Most of the courts will

<sup>1</sup> Reg. v. Chapman, 6 Mod. 152. 451; Fisher v. Charleston (City), 17 W. Va. 595.

When this decision was made in 1707, the writ was only brought against municipal corporations.

<sup>2</sup> Anon., 2 Salk. 525; Commercial Bank v. Canal Com'rs, 10 Wend. 25; State v. Sheridan, 43 N. J. L. 82; Harwood v. Marshall, 10 Md.

<sup>3</sup> Levy v. English, 4 Ark. 65.

<sup>4</sup> Crans v. Francis, 24 Kans. 750; Rice v. State, 95 Ind. 33; State v. Sheridan, 43 N. J. L. 82.

<sup>5</sup> State v. Everett, 52 Mo. 89.

<sup>6</sup> State v. Penn. R. R., 41 N. J. L. 250.

hardly regard the latter objection as tenable, since the questions may be as fully considered on a motion to quash as on a demurrer. When an alternative writ had been granted after argument and upon notice and after depositions had been taken, the court properly refused to entertain a motion to quash it on the ground that it had been improvidently granted.<sup>1</sup> A motion to quash admits as true only such allegations of the alternative writ as are well pleaded, and does not admit matters of law, legal conclusions or statutory construction.<sup>2</sup> Mere formal defects may be reached by a motion to quash.<sup>3</sup> Such objections must always be taken *in limine*, and will not be considered after a return has been made to the writ.<sup>4</sup> Where it was objected, after a return had been made, that the three relators represented the grievances of their three respective towns, and therefore could not join in one writ, the court considered the objection to be merely formal, and that, if available at all, it should have been urged by a motion to quash.<sup>5</sup> When the writ is defective in substance, it is subject to objection at any period in the case prior to the granting of the peremptory writ, and may be quashed therefor.<sup>6</sup> The respondent has been allowed to impeach the validity of the alternative writ upon a demurrer to a traverse to a return,<sup>7</sup> and even on an attachment for contempt.<sup>8</sup> An alternative writ was quashed for gross faults after the time for making a return

<sup>1</sup> State v. Penn. R. R., 41 N. J. L. 250.

<sup>2</sup> State v. County Court, 33 W. Va. 589; Dillon v. Barnard, 21 Wall. 430; United States v. Ames, 99 U. S. 35.

<sup>3</sup> Trustees of Canal (Bd.) v. People, 12 Ill. 248.

<sup>4</sup> Fuller v. Plainfield A. School, 6 Conn. 532; People v. Sullivan Co. (Sup'rs), 56 N. Y. 249; Commercial Bank v. Canal Com'rs, 10 Wend. 25.

<sup>5</sup> People v. Ontario Co. (Sup'rs), 85 N. Y. 323.

<sup>6</sup> Fisher v. Charleston (City), 17 W. Va. 595; People v. Westchester

(Sup'rs), 15 Barb. 607; Commercial Bank v. Canal Com'rs, 10 Wend. 25; Trustees of Canal (Bd.) v. People, 12 Ill. 248; People v. Fulton (Sup'rs), 14 Barb. 52; King v. Margate Pier Co., 3 B. & Ald. 220; People v. Batchellor, 53 N. Y. 128; Haskins v. Scott Co. (Board of Sup'rs), 51 Miss. 406; People v. Davis, 93 Ill. 133; Hawkins v. Moore, 3 Ark. 345; Knight v. Ferris, 6 Houst. 283.

<sup>7</sup> Clarke v. Leicestershire, etc. Canal, 6 Ad. & E. (N. S.) 898.

<sup>8</sup> Q. v. Ledyard, 1 Q. B. 616.



had expired and without requiring first a return from the respondent.<sup>1</sup> The motion to quash, like a demurrer, should be made before a return is made to the writ.<sup>2</sup>

§ 270. **Demurrer to the alternative writ.**—Instead of moving to quash the alternative writ, the respondent may demur to it. As already mentioned, the statute of 9 Anne, chapter 20, did not authorize a demurrer to the alternative writ, and the English courts would not allow such a demurrer to be filed; but they granted, upon application, a *concilium*, which is equivalent thereto. In America the usual practice is to allow the respondent to demur to the alternative writ without resorting to the circumlocution of a *concilium*.<sup>3</sup> It is allowable, however, to put in a return, which raises law points, and to that extent is practically a demurrer.<sup>4</sup>

§ 271. **Amendment to alternative writ.**—In case the alternative writ is found to be defective on a motion to quash or on demurrer, the relator will be allowed to amend it if he so desires.<sup>5</sup>

§ 272. **Return after the overruling of the demurrer to, or motion to quash, the alternative writ.**—The custom now is, if the demurrer to, or the motion to quash, the alternative writ is overruled, to allow the respondent to put in a return.<sup>6</sup> This is not conceded to be a matter of right,

<sup>1</sup> King v. Willingford (Just.), 2 Barn. 132.

<sup>2</sup> Poteet v. Com'rs, 30 W. Va. 58.

<sup>3</sup> Newman, Ex parte, 81 U. S. 152; State v. Jennings, 56 Wis. 113; Lyman v. Martin, 2 Utah, 136; State v. Sheridan, 43 N. J. L. 82; State v. Chicago, etc. R. R., 19 Neb. 476; Boone Co. (Com'rs) v. State, 61 Ind. 379; Chance v. Temple, 1 Iowa, 179; State v. Lafayette Co. Court, 41 Mo. 545; Lee Co. v. State, 36 Ark. 276; Hardee v. Gibbs, 50 Miss. 802; Swan v. Gray, 44 Miss. 393; Meyer v. Dubuque (City), 43 Iowa, 592.

<sup>4</sup> Madison Co. Court v. People, 58

Ill. 456; Wheeler v. Northern C. I. Co., 10 Colo. 583; Brown v. Ruse, 69 Tex. 589; People v. Salomon, 46 Ill. 333; State v. Lafayette Co. Court, 41 Mo. 545; Morton v. Compt. Gen., 4 Rich. (N. S.) 430; Long v. State, 17 Neb. 60; Wise v. Bigger, 79 Va. 269.

<sup>5</sup> § 294.

<sup>6</sup> State v. Jennings, 56 Wis. 113; State v. Sheridan, 43 N. J. L. 82; Chance v. Temple, 1 Iowa, 179; Meyer v. Dubuque (City), 43 Iowa, 592; Lyman v. Martin, 2 Utah, 136; Hardee v. Gibbs, 50 Miss. 802; State v. Lean, 9 Wis. 279; State v.

but is considered to be proper, when justice requires that the respondent should be allowed to answer. Sometimes the court has required the respondent to first submit to it his proposed answer, or to show the merits of his defense by an affidavit, or has received the oral statements of his counsel in lieu of an affidavit. In such cases, if the court considered the proposed defenses to be without merit, or that they had already been passed on in the decision of the demurrer or motion to quash, the respondent was not allowed to make a return and the peremptory writ was ordered.<sup>1</sup>

**§ 273. No prescribed form for a return, but it must contain the necessary allegations.**—As stated before, there is no prescribed form for a return, and it may be very informal, provided it contains the necessary allegations. Legal objections to the writ have often been urged by way of answer, instead of by demurrer or motion to quash. Long legal arguments have sometimes been inserted in the returns, which practice, though sometimes reprobated, has not been decided to be inadmissible.<sup>2</sup>

**§ 274. Certainty and completeness of statement required in a return.**—Growing out of the rule, that a return to a *mandamus* could not be traversed, there was no form of pleading known to the law in which greater certainty was required than in a return to a writ of *mandamus*.<sup>3</sup> Lord Coke says there are three kinds of certainty, which may be used in pleading, viz.: 1. Certainty to a common intent, which is sufficient in a plea in bar. 2. Certainty to a certain intent in general, as in counts, replications, etc., and in indictments. 3. Certainty to a certain in-

Grand Island, etc. R. R., 27 Neb. 694.

<sup>1</sup> State v. Lafayette Co. Court, 41 Mo. 545; State v. Bergen (Freeholders), 52 N. J. L. 313.

<sup>2</sup> State v. Judge Third Dist. Ct., 6 La. An. 484; Morton v. Compt. Gen., 4 Rich. (N.S.) 430; Conrow v. Schloss,

55 Pa. St. 28; Smyth v. Titcomb, 31 Me. 272; Wright v. Johnson, 5 Ark. 687; White v. Holt, 20 W. Va. 792; Bradstreet, Ex parte, 7 Pet. 634.

<sup>3</sup> Prospect Brewing Co.'s Petition, 127 Pa. St. 523; Harwood v. Marshall, 10 Md. 451.

tent in every particular, which the law rejects as partaking of too much subtlety.<sup>1</sup> Certainty to a certain intent in general was considered to be necessary in a return to an alternative writ of *mandamus*;<sup>2</sup> and it has ever been considered that certainty to a certain intent in every particular was required,<sup>3</sup> though such certainty is by other authorities only necessary in pleas of estoppel,<sup>4</sup> and in pleas not favored by the law, such as the plea of alien enemy.<sup>5</sup> The courts held that the statute of 9 Anne, chapter 20, made no change as to the certainty required in the return, though the reason therefor was no longer the same.<sup>6</sup> But the courts have from time to time relaxed the rules in this respect.<sup>7</sup> The certainty required in a return to an alternative writ of *mandamus* is now defined to be a statement which, upon a fair and reasonable construction, may be called certain without recurring to possible facts which do not appear.<sup>8</sup> It is elsewhere said that certainty to a common intent is sufficient, and it is only necessary that the ordinary mind, disregarding technicality of pleading, may easily apprehend the allegations; that it suffices if the answer, without ambiguity or evasion, responds to and denies the assertions of the writ.<sup>9</sup> The return should show a legal reason for not obeying the writ,<sup>10</sup> though it does not answer the sup-

<sup>1</sup> Long's Case, 5 Coke, 121.

<sup>2</sup> 1 Chit. Pl. 257; *King v. Lyme Regis* (Mayor), Doug. 144; *Candee, Ex parte*, 48 Ala. 386; *Soc. for Visit. v. Com.*, 52 Pa. St. 125.

<sup>3</sup> *Prospect Brewing Co.'s Petition*, 127 Pa. St. 523; *Harwood v. Marshall*, 10 Md. 451; *King v. Abingdon* (Mayor), 1 L. Raym. 559; 12 Mod. 401; 2 Salk. 431.

<sup>4</sup> *King v. Lyme Regis* (Mayor), Doug. 144.

<sup>5</sup> 1 Chit. Pl. 257.

<sup>6</sup> Lord Mansfield in *King v. Lyme Regis* (Mayor), Doug. 144; *Q. v. Pomfret* (Mayor), 10 Mod. 107.

<sup>7</sup> *Tallapoosa* (Com'rs' Court) v.

*Tarver*, 21 Ala. 661; *Harwood v. Marshall*, 10 Md. 451.

<sup>8</sup> *King v. Lyme Regis* (Mayor), Doug. 144; *Candee, Ex parte*, 48 Ala. 386; *Soc. for Visit. v. Com.* 52 Pa. St. 125; *Com. v. Allegheny Co.* (Com'rs), 32 Pa. St. 218. If the return is certain on its face the court cannot intend facts inconsistent with it in order to make it bad. *King v. Lyme Regis* (Mayor), *supra*.  
<sup>9</sup> *Central, etc. Co. v. Com.*, 114 Pa. St. 592.

<sup>10</sup> *King v. York* (Archb.), 6 T. R. 490; *Springfield v. Hampden* (Co. Com'rs), 10 Pick. 59.

posal of the writ.<sup>1</sup> The return must deny the allegations of the writ or show other facts sufficient to defeat the claim.<sup>2</sup> When the writ is traversed, the facts must be positively and directly denied,<sup>3</sup> and the denial must be single and special as to any allegations intended to be controverted.<sup>4</sup> A general denial in a return is a nullity at common law.<sup>5</sup> When any new matters are relied upon as a defense to the writ, the return must positively, clearly, specifically and distinctly set out the facts relative thereto,<sup>6</sup> so that the relator may be able to traverse them,<sup>7</sup> and the court may be enabled to see at once whether, if established, they justify a disobedience of the writ.<sup>8</sup> Every plea must have convenient certainty as to time, place and persons.<sup>9</sup> The return must be good, as tested by the ordinary rules of pleading.<sup>10</sup> When the respondent in his return sets forth matter in abatement and also facts in defense on the merits and asks judgment on the merits, he waives his plea in abatement.<sup>11</sup> Nothing will be intended in a return.<sup>12</sup> It has been held that presumption and intendment, so far as they go, must be in favor of a return;<sup>13</sup> but if the return does

<sup>1</sup> *Rex v. Welbeck (Inhab.)*, Stra. 1143.

<sup>2</sup> *Commercial Bank v. Canal Com'rs*, 10 Wend. 25; *Levy v. English*, 4 Ark. 65; *Canova v. State*, 18 Fla. 512; *State v. State Bd. Health*, 103 Mo. 22.

<sup>3</sup> *Canova v. State*, 18 Fla. 512; *Levy v. English*, 4 Ark. 65; *United States v. Bayard*, 16 Dist. Col. 428.

<sup>4</sup> *State v. Williams*, 96 Mo. 13; *Sansom v. Mercer*, 68 Tex. 488.

<sup>5</sup> *Sansom v. Mercer*, 68 Tex. 488. It seems to be allowed in Indiana, probably in conformity with pleadings in other suits. *Bowers v. Taylor*, 127 Ind. 272.

<sup>6</sup> *Harwood v. Marshall*, 10 Md. 451; *Commercial Bank v. Canal Com'rs*, 10 Wend. 25; *State v. Trammel* (Mo., Nov. 9, 1891), 17 S. W. Rep. 502.

<sup>7</sup> *People v. Ohio Grove Town*, 51 Ill. 191.

<sup>8</sup> *Com. v. Allegheny (Com'rs)*, 37 Pa. St. 277; *Talapoosa (Com'rs' Court) v. Tarver*, 21 Ala. 661; *State v. Jones*, 10 Iowa, 65; *Polk Co. Com'rs v. Johnson*, 21 Fla. 578; *Woodruff v. New York, etc. R. R.*, 59 Conn. 63.

<sup>9</sup> *Gorgas v. Blackburn*, 14 Ohio, 252.

<sup>10</sup> *People v. Baker*, 35 Barb. 105; *Silver v. People*, 45 Ill. 224; *Potts v. State*, 75 Ind. 336; *Chance v. Temple*, 1 Iowa, 179.

<sup>11</sup> *Silver v. People*, 45 Ill. 224. *Contra*, *State v. Jennings*, 56 Wis. 113; *State v. Smith* (Mo. 1891), 15 S. W. Rep. 614.

<sup>12</sup> *Stephen's Nisi Prius*, 2326; *King v. Bristol*, 1 Show. 288.

<sup>13</sup> *Springfield v. Hampden (Co. Com'rs)*, 10 Pick. 59.

not answer the important facts alleged in the writ, then every intendment is made against it.<sup>1</sup> The return is construed most strongly against the pleader.<sup>2</sup> Allegations in the writ, not denied, nor confessed and avoided, are taken as true.<sup>3</sup> Where officers were called upon to show cause why they refused to approve a bond given to procure a license to sell liquor, and in their answer they declined to state their reasons for non-action, it was considered to be fair to assume that they acted arbitrarily and without reason.<sup>4</sup> The respondent is called upon to answer to the writ, and he must confine his traverses to the statements therein contained.<sup>5</sup> He cannot answer the writ by his legal inferences from facts not stated. The court has a right to know what the facts are, that it may judge whether the legal inferences are well drawn.<sup>6</sup>

§ 275. **Certainty required in a return to a writ to restore a party removed from office or membership in a corporation.**—When to a *mandamus* proceeding to restore a person removed from an office or membership in a corporation, an amotion is returned, the return must set out all the necessary facts precisely to show that the person was removed in a legal and proper manner and for a legal cause. It is not sufficient to return conclusions. All the necessary facts must be precisely returned, that the court may be able to judge of the sufficiency of the proceeding, both as to cause and form of proceeding.<sup>7</sup> All such facts must be set forth distinctly and certainly, not argumentatively, inferentially or evasively.<sup>8</sup> The return must show that the relator had notice to appear and defend himself,<sup>9</sup> and

<sup>1</sup> People v. Kilduff, 15 Ill. 492; People v. Ohio Grove Town, 51 Ill. 191.

<sup>2</sup> Gorgas v. Blackburn, 14 Ohio, 252.

<sup>3</sup> State v. Lean, 9 Wis. 279; Rex v. Malden (Bailiffs), 2 Salk. 431.

<sup>4</sup> Amperse v. Kalamazoo, 59 Mich. 78.

<sup>5</sup> Chance v. Temple, 1 Iowa, 179.

<sup>6</sup> Com. v. Pittsburgh, 34 Pa. St. 496.

<sup>7</sup> Rex v. Liverpool (Town), Burr. 723; Buller's Nisi Prius, 201; Com. v. German Society, 15 Pa. St. 251.

<sup>8</sup> Society v. Com., 52 Pa. St. 125.

<sup>9</sup> Com. v. German Society, 15 Pa. St. 251.

such notice should have summoned him to answer a particular charge.<sup>1</sup> The return should show all the proceedings attending the amotion.<sup>2</sup> If the cause of the removal is not shown by the return, the decision removing the relator will be reversed.<sup>3</sup> A return, that the relator was removed for a violation of duty or for disobeying the orders or laws, is too general; it should specify the charges or the particular orders or laws which were disobeyed.<sup>4</sup> It must be stated that the offense was found after a formal investigation, and must not rest on inference alone.<sup>5</sup> A return, that the relator was tried and convicted of the charges according to the constitution and by-laws, is not sufficient without showing that the association took proofs.<sup>6</sup> It must also appear in the return that the proceedings were conducted before an assembly of the proper persons which was duly held.<sup>7</sup> When the meeting was not provided for by the charter or by-laws of the corporation, it should be shown in the return that a special, or at least a general, notice was given to each individual member.<sup>8</sup> Since the power to remove a member exists *prima facie* as a matter of law in the corporation at large, it is not necessary to allege that the corporation has such power, but such power exists in a part of the corporation only by charter or prescription, and its existence must appear by the return, in case the amotion was made by such part of the corporation.<sup>9</sup> Where public officers were removed from office, it was held that the record of the board which made the removal must incorporate therein the charges and the substance of the evidence, or

<sup>1</sup> Rex v. Liverpool (Town), Burr. 723.

<sup>2</sup> Com. v. Guardians of Poor, 6 S. & R. 469.

<sup>3</sup> State v. Watertown (Com. Coun.), 9 Wis. 254.

<sup>4</sup> Com. v. Guardians of Poor, 6 S. & R. 469; King v. Doncaster (Mayor), 2 L. Raym. 1564.

<sup>5</sup> Schweiger v. Society, 13 Phila. 113.

<sup>6</sup> Society for Visitation v. Com., 52 Pa. St. 125.

<sup>7</sup> Com. v. German Society, 15 Pa. St. 251.

<sup>8</sup> Rex v. Liverpool (Town), Burr. 723.

<sup>9</sup> King v. Lyme Regis (Mayor), Doug. 144; Buller's Nisi Prius, 201; Rex v. Doncaster (Mayor), Say. 37.

their action would be overruled.<sup>1</sup> The cause of expulsion must be such as the corporation can legally act upon and such as warrants its decision.<sup>2</sup> When, however, the trial and sentence have been regularly conducted, the sentence of the society cannot be inquired into collaterally, nor can the merits of the expulsion be re-examined.<sup>3</sup>

§ 276. A return is sufficient which follows the suggestions of the writ.—A return which follows the suggestions of the writ is considered to be sufficient.<sup>4</sup> To the statement in the writ that A. was on Easter-week chosen a church-warden, and, to the order to swear him into office, a return that A. was not elected a church-warden on Easter-week, was held to be sufficient.<sup>5</sup> To a *mandamus* to swear and admit A. as a church-warden, which stated that he had been duly nominated, elected and chosen, it sufficed to return that he was not duly elected.<sup>6</sup> To a *mandamus* to restore a person to the office of sexton, a return was made that he was not duly elected and that the respondents had the right to remove him, and had removed him. The return was considered to be consistent, because he was in the possession of the office, whether duly elected or not, and the respondents had actually removed him.<sup>7</sup> To a *mandamus* to restore the plaintiff as an attorney in the corporation, which suggests an amotion by the respondents or by some of them, a return that he was not removed by them or by any of them was considered to be good, though he might have been removed by their predecessors or by other parties.<sup>8</sup> To a *mandamus* to admit and swear A. into an office, a return that the respondents had power to examine whether the party elected was a fit person for the office, and that they had so examined and decided that A. was not a fit person,

<sup>1</sup> Geter v. Com'rs, 1 Bay, 354;  
Singleton v. Com'rs, 2 Bay, 105.

<sup>2</sup> Rex v. Liverpool (Town), Burr.  
723; ante, § 168.

<sup>3</sup> Soc. for Visitation v. Com., 52  
Pa. St. 125.

<sup>4</sup> Wright v. Fawcett, Burr. 2041.

<sup>5</sup> Rex v. Penrice, Stra. 1235.

<sup>6</sup> King v. Williams, 8 B. & C. 681.

<sup>7</sup> Rex v. Taunton (Church-war-  
dens), Cowp. 413.

<sup>8</sup> King v. Colchester (Town), 2  
Keb. 188.

was held to be sufficient, and they were not required to give their reasons for their action.<sup>1</sup>

§ 277. Several defenses may be stated in a return.— A return need not be single, but may contain as many pleas or defenses to all or to parts of the writ as the respondent may wish to insert, provided they be consistent with each other.<sup>2</sup> If any of the pleas or defenses are inconsistent with each other, the return is defective and will be quashed, since the court knows not which to believe,<sup>3</sup> unless some of such defenses are bad in point of law, in which case the court may quash the bad defenses and send the good ones to trial, if the remaining defenses are not inconsistent with each other.<sup>4</sup> If the return consists of several independent matters, consistent with each other, a part of which are in law good defenses and a part are bad defenses, the court will quash only the bad defenses and will require the prosecutor to plead to or traverse the others.<sup>5</sup>

§ 278. Pendency of other litigation pleaded in abatement.— The pendency of civil suits involving the same principles and issues are not considered to be a bar to a *mandamus* proceeding, since the latter is a high prerogative writ in the name of the sovereign.<sup>6</sup> The pendency of another *mandamus* proceeding, wherein the parties and the questions involved are the same, may be pleaded in abatement. In such matters the rule in civil actions is applicable.<sup>7</sup> The reason of the rule is that such subsequent pro-

<sup>1</sup> King v. London (Mayor), 3 B. & Ad. 255.

5 D. & E. 66; Q. v. Pomfret (Mayor), 10 Mod. 107.

<sup>2</sup> Candee, Ex parte, 48 Ala. 386; State v. Moss, 35 Mo. Ap. 441; Reg. v. Norwich (Mayor), 2 Salk. 436; King v. London (Mayor), 3 B. & Ad. 255; Wright v. Fawcett, Burr. 2041.

<sup>4</sup> Reg. v. Norwich, 2 Salk. 436, n.

<sup>5</sup> King v. Cambridge (Mayor), 2 Term, 456; Legg v. Annapolis (City), 42 Md. 203; Selma, etc. R. R., Ex parte, 46 Ala. 230.

<sup>3</sup> Reg. v. Norwich (Mayor), 2 Salk. 436; L. Raym. 1244; Candee, Ex parte, 48 Ala. 386; King v. London (Mayor), 9 B. & C. 1; King v. Cambridge (Mayor), 2 Term, 456; King v. York (Mayor), 5 Term, 66;

<sup>6</sup> Calaveras Co. v. Brockway, 30 Cal. 325; State v. Moss, 35 Mo. Ap. 441.

<sup>7</sup> State v. Sumter Co. Com'rs, 20 Fla. 859.



ceeding is unnecessary, and is therefore deemed vexatious and oppressive; accordingly, where the second writ is not deemed unnecessary, the rule will not be applied. A writ to compel a county treasurer to pay over the school funds to the proper officer was allowed, though the pendency of a prior *mandamus* to the same effect was pleaded. The first proceeding was tied up by an appeal, which could not be obtained here, since the writ was applied for in the highest court, and the public schools could not be kept open without the money, so the court, deeming the second writ to be necessary, ordered its issuance.<sup>1</sup> Where alternative writs had been granted, upon a showing that there were reasonable grounds of suspicion that the parties did not intend to execute such writs, or that they could not execute them effectually and legally, the courts granted cross or concurrent writs at the application of the parties who were interested in the matter.<sup>2</sup> The plea has been overruled, where, though both of the proceedings were instituted practically for the same object, the relators were different,—in one case the district attorney appearing, and in the other private parties.<sup>3</sup> A plea that a prior *mandamus* proceeding, involving the same facts, was quashed, affords no excuse nor justification for refusal to obey the writ, since it does not contain the elements of a *res adjudicata* or of a *lis pendens*.<sup>4</sup>

§ 279. *Pleas puis darrein continuance*.—Facts which have occurred since the issuing of the alternative writ of *mandamus* may be pleaded in the return in bar of the peremptory writ,<sup>5</sup> but facts which occur after issue joined should be set up by plea *puis darrein continuance* or some similar pleading, else they will not be received in evidence.<sup>6</sup>

<sup>1</sup> *State v. Dougherty*, 45 Mo. 294. U. S. 480; *State v. McCullough*, 3

<sup>2</sup> *Reg. v. Wigan (Corp.)*, Burr. 782; *Nev. 202*. The contrary was held in *State v. Cole*, 25 Neb. 342, wherein a demurrer to a supplemental answer was sustained, because the issues must be determined as they

*Rex v. Haslemere, Sayer*, 106.

<sup>3</sup> *Foot v. Myers*, 60 Miss. 790.

<sup>4</sup> *State v. Moss*, 35 Mo. Ap. 441.

<sup>5</sup> *State v. Weeks*, 93 Mo. 499.

<sup>6</sup> *Thompson v. United States*, 103

existed when the suit was begun or

**§ 280. Positiveness of allegation required in a return.** In conformity with the requirement that the allegations in the return must be positive and certain, the allegations therein contained cannot be stated to be founded on information and belief.<sup>1</sup> The allegations contained in the writ also cannot be denied on information and belief,<sup>2</sup> and such a denial is considered not to put in issue the facts stated by the relator, but to admit them.<sup>3</sup> Where the respondent is required to swear to his plea, he should not be confined to pleading matters which are within his own personal knowledge, but such statement as shows his good faith, and which is as positive as is within his power, should be accepted.<sup>4</sup> Though the mandatory part of the writ may be very general, yet the return must be very minute in showing why the respondent has not obeyed the order,<sup>5</sup> and it should contain positive allegations of fact and not mere inferences from facts.<sup>6</sup>

**§ 281. Instances of returns which are adjudged to be insufficient.**—Returns have been considered to be insufficient: to a *mandamus* to admit one to be clerk of the city, a return that he had not taken the oath according to the statute before the mayor, when it might have been taken before two justices;<sup>7</sup> to a *mandamus* to select two papers of opposite politics in which to publish the laws, a return alleging that a selection had been made, which failed to aver compliance with one provision of the law, and averred an equivocal compliance with another provision;<sup>8</sup> to a *man-*

the issues were joined. Where a *mandamus* was sought to compel the filing and approval of a bond, a subsequent matter occurring after the refusal to approve the bond was considered to be foreign and irrelevant. *Candee, Ex parte*, 48 Ala. 386.

<sup>1</sup> *State v. Sumter Co. Com'rs*, 22 Fla. 1.

<sup>2</sup> *People v. Brooklyn (Com. Council)*, 77 N. Y. 503. *Contra*, *People v. Alameda Co. (Sup'rs)*, 45 Cal.

395.

<sup>3</sup> *People v. Fulton Co. (Sup'rs)*, 53 Hun, 254; *State v. Williams* 96 Mo. 13; *State v. Trammel* (Mo., Nov. 9, 1891), 17 S. W. Rep. 502.

<sup>4</sup> *State v. Sumter Co. Com'rs*, 22 Fla. 1.

<sup>5</sup> *Reg. v. Southampton (Com'rs)*, 30 L. J. Q. B. 244.

<sup>6</sup> *State v. Hawes*, 43 Ohio St. 16.

<sup>7</sup> *Le Roy v. Slatford*, 5 Mod. 316.

<sup>8</sup> *People v. Sullivan Co. (Sup'rs)*, 56 N. Y. 249.

*damus* to allow the relator to act as superintendent of a foreign corporation, a return alleging that relator's appointment was not legally made, without showing the defects;<sup>1</sup> to a *mandamus* to sign a bill of exceptions, a return that the writ does not state the exceptions in the manner and form in which they were taken, without specifying the errors;<sup>2</sup> to a *mandamus* to restore A. as a capital burgess, a return that he wrote a scandalous letter to an alderman which amounted to a libel, and, being charged therewith at a court afterward holden, he assented to being turned out, etc., because if he resigned it should have so alleged, and that they accepted his resignation;<sup>3</sup> to a *mandamus* to restore the relator to the place of an alderman, a return that he was removed by thirty of the common council in the council chamber assembled, because it did not aver that they were assembled as a common council;<sup>4</sup> to a *mandamus* to a justice of the peace to send up the papers on an appeal, a return that his fees had not been paid or tendered prior to the service of the writ, since they may have been paid since;<sup>5</sup> to a *mandamus* to a treasurer to pay a warrant, a return that he had no money when served with the writ, and that he has none now, because it does not state that he had no money when payment was demanded on several occasions;<sup>6</sup> to a *mandamus* to levy a specific tax to pay a certain judgment, a return that they had levied a tax of one per cent. to pay the judgment and other claims, and that that tax was sufficient to pay them all, because it did not show the whole act constituting the levy, and because it stated that the tax was levied to pay other claims also;<sup>7</sup> to a *mandamus* to restore the relator to the office of a burgess, a return that he was duly elected, but was removed, and that he had not taken the sacrament within a year prior to his election, which was therefore null and

<sup>1</sup> State v. McCullough, 3 Nev. 202.

<sup>5</sup> People v. Harris, 9 Cal. 571.

<sup>2</sup> Reichenbach v. Raddach, 121 Pa. St. 18.

<sup>6</sup> Hendricks v. Johnson, 45 Miss. 644.

<sup>3</sup> Reg. v. Lane, 2 L. Raym. 1304.

<sup>7</sup> Benbow v. Iowa City, 7 Wall. 313.

<sup>4</sup> King v. Taylor, 3 Salk. 231.

void, because the two defenses were inconsistent;<sup>1</sup> to a *mandamus* to swear into office A. and B. *debite* elected churchwardens, a return that they were not duly elected, because it did not state that neither was duly elected, it being their duty to swear in either, if he was elected;<sup>2</sup> to a *mandamus* to choose one of two elected to serve as mayor, a return that they were elected, but had not taken the sacrament, which rendered the election void, because there might have been a subsequent election.<sup>3</sup> If the writ set forth all the proceedings and state that by reason thereof A. was elected, it is a bad return to say that A. was not elected. The respondent should traverse one of the facts alleged.<sup>4</sup> Where, instead of making a return, the respondent filed a bill, asking for an injunction to restrain the relator from further prosecuting his *mandamus* proceeding, the court refused to take the bill as a return, and properly ordered the respondent to make a return.<sup>5</sup>

§ 282. **Who shall make the return.**—The return to the alternative writ must be made by those to whom it is directed, and if other parties make the return they are liable to an action on the case, and are also punishable by attachment for contempt of court.<sup>6</sup> When the writ is directed to a corporation or to a board, it should in form be the return of such corporation or board.<sup>7</sup> A return by individual members of a board is not a return by the board, and the court may order it to be withdrawn,<sup>8</sup> or to be stricken from the files.<sup>9</sup> A return to a writ of *mandamus*, directed to a

<sup>1</sup> *Q. v. Pomfret* (Mayor), 10 Mod. 107. *Reg. v. Norwich* (Mayor), 2 Salk. 436, 1 L. Raym. 1244, is almost a similar case.

<sup>2</sup> *Regina v. Guise*, 2 L. Raym. 1008; 3 Salk. 88; 6 Mod. 89.

<sup>3</sup> *Rex v. Abington* (Mayor), 2 Salk. 432; 1 L. Raym. 559.

<sup>4</sup> *King v. York* (Mayor), 5 Term. 66.

<sup>5</sup> *Neuse, etc. Co. v. New Berne* (Com'rs), 6 Jones, 204.

<sup>6</sup> *State v. Pennsylvania R. R.*, 41 N. J. L. 250; *Dinwiddie Justices v. Chesterfield Justices*, 5 Call, 556.

<sup>7</sup> *People v. San Francisco* (Sup'rs), 27 Cal. 655; *King v. The Bailly*, 1 Keb. 33; *King v. St. Andrew* (Gov. of Poor), 7 A. & E. 281.

<sup>8</sup> *McCoy v. Harnett Co.* (Just.), 4 Jones, 180.

<sup>9</sup> *People v. San Francisco* (Sup'rs), 27 Cal. 655; *Clarke Co. (Com'rs) v. State*, 61 Ind. 75. When the writ is

county court, cannot be made by its attorney.<sup>1</sup> A majority of a board can make the return in the name of the board. The proper proceeding is for the board to convene and appoint one of their body to make the proper affidavit and do all things necessary, they agreeing to the return to be made.<sup>2</sup> A return for a municipal corporation should be made by the mayor with the consent of a majority of the burgesses.<sup>3</sup> If upon a consultation a majority of the burgesses be against the views of the mayor and make return in his name, it shall be taken as his return unless he disavow it.<sup>4</sup> Where a writ of *mandamus* was directed to the mayor, bailiffs and burgesses, and it was asserted that the return, which had been filed in their joint names, was made by the mayor and a minority of the bailiffs and burgesses, the court refused to try the question on affidavits, but allowed the parties, if they desired, to file an information against the mayor.<sup>5</sup> When the board cannot agree upon their return and there is an equality of votes, in the quaint language of the old books, they must agree, or else they shall be brought up as in contempt and laid by the heels till they do agree.<sup>6</sup> If there are two returns, each purporting to be the return of the board, the court may ascertain which is the return of the majority.<sup>7</sup>

**§ 283. Verification of the return.**—At common law the respondent was not required to verify his return to the alternative writ.<sup>8</sup> The court may, of its own accord, require the respondent to swear to his return.<sup>9</sup> Such an order has

directed to each member of the board by name, as well as to the board, under the New York statute they may answer jointly or severally. *People v. Police Board*, 46 Hun. 296.

<sup>1</sup> *Dinwiddie (Just.) v. Chesterfield (Just.)*, 5 Call, 556.

<sup>2</sup> *McCoy v. Hartnett Co. (Just.)*, 4 Jones, 180; *State v. McMillan*, 8 Jones, 174.

<sup>3</sup> *King v. Abingdon*, 12 Mod. 308.

<sup>4</sup> *Reg. v. Chapman*, 6 Mod. 152.

<sup>5</sup> *Rex v. Abingdon (Mayor)*, 2 Salk. 431.

<sup>6</sup> *Reg. v. Chapman*, 6 Mod. 152.

<sup>7</sup> *People v. San Francisco (Sup'rs)*, 27 Cal. 655.

<sup>8</sup> *Burgess of Devises*, 2 Keb. 725; *State v. Wickham*, 65 Mo. 634; *State v. Edwards*, 11 Mo. Ap. 152; *State v. Morris*, 103 Ind. 161; *Tallahpoosa (Com'rs' Court) v. Tarver*, 21 Ala. 661.

<sup>9</sup> *Audly's Case*, 1 Latch, 123.

been issued where the court suspected that the return was false.<sup>1</sup> The court will grant such an order at its own discretion, and is not bound to do so at the petition of the relator.<sup>2</sup> In some states the law or the rule of court requires that the return be verified.<sup>3</sup>

**§ 284. Treatment of a return which is evasive or frivolous.**—A return which is evasive, frivolous, or ambiguous, will not be tolerated.<sup>4</sup> Where such a return is presented, the court may disregard it,<sup>5</sup> or quash it,<sup>6</sup> or strike it off the files on motion,<sup>7</sup> or issue a peremptory writ.<sup>8</sup> When the return is utterly inapplicable and absurd, or it appears to be frivolous and to have been purposely made to avoid the justice of the court, the court may also grant a rule on the respondent to show cause why an attachment should not issue against him for contempt of court.<sup>9</sup> If, however, a return contains or sets up any sufficient reason for refusing the *mandamus*, it should not be quashed as a whole, though in other respects it be evasive and irresponsible.<sup>10</sup> If the facts averred in the return may be true consistently with the suggestion of the writ, then the return is vicious.<sup>11</sup>

**§ 285. Demurrer to return, and rules governing it.**—The return may be objected to by a motion to quash or by a demurrer. The English courts, since the statute of 9 Anne, chapter 20, did not provide for a demurrer to the return, did not allow a demurrer to be filed, but attained the same end by a *concilium*. At present, under the statute of 6 and 7 Vic-

<sup>1</sup> Manaton's Case, Ray. 365.

<sup>2</sup> Burgess of Devises, 2 Keb. 725.

<sup>3</sup> State v. Sumter Co. Com'rs, 22 Fla. 1; Chance v. Temple, 1 Iowa, 179; People v. Fulton Co. (Sup'rs), 53 Hun, 254; Com. v. Henry, 49 Pa. St. 530; Com. v. Philadelphia (Com'rs), 1 Whart. 1.

<sup>4</sup> State v. Jones, 10 Iowa, 65; Com. v. Pittsburg (Sel. Council), 34 Pa. St. 496.

<sup>5</sup> Sansom v. Mercer, 68 Tex. 488.

<sup>6</sup> Com. v. Pittsburg, 34 Pa. St. 496;

Q. v. Poole (Mayor), 1 Q. B. 616;

Q. v. St. Andrews (Gov. etc.), 10 A. & E. 736; Harwood v. Marshall, 10 Md. 451.

<sup>7</sup> Q. v. Payn, 11 A. & E. 955.

<sup>8</sup> Williamsburgh (Trustees), In re, 1 Barb. 34.

<sup>9</sup> King v. Robinson, 8 Mod. 336; Q. v. Poole (Mayor), 1 Q. B. 616.

<sup>10</sup> Legg v. Annapolis (City), 42 Md. 203.

<sup>11</sup> Harwood v. Marshall, 10 Md.

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toria, a demurrer may be filed to a return. The American courts, which expressly or impliedly adopted the statute of 9 Anne, departed from the English precedents, and allowed the relator to file a demurrer to the return.<sup>1</sup> Some of the American courts did not regard that statute, which was enacted a hundred years later than the period to which the common law of England, so far as applicable, is generally adopted as authoritative in this country,<sup>2</sup> and they adopted the strict rules of the early English decisions; but it is believed that at present all of the American courts, either by virtue of statute or rule of court, allow a demurrer to be filed to the return.<sup>3</sup> A motion for a peremptory writ on the return has been allowed, but such motion is merely a substitute for a general demurrer,<sup>4</sup> admitting the truth of the allegations contained in the return, but denying their sufficiency in law.<sup>5</sup> Objections, which are required to be taken by special demurrer, or by motion to strike out, will be disregarded on such a motion.<sup>6</sup> On the argument of such a motion, the relator is entitled to the benefit of all the admissions in the return, but he cannot insist upon facts alleged by him in his pleadings which are not admitted.<sup>7</sup> If any material averment of the petition or alternative writ

<sup>1</sup>Barney v. State, 42 Md. 480; Silverthorne v. Warren R. R., 33 N. J. L. 173; New Haven, etc. R. R. v. State, 44 Conn. 376; State v. Ryan, 2 Mo. Ap. 303; State v. Supervisors (Board), 64 Wis. 218.

<sup>2</sup>The common law of England is generally accepted as authoritative here, as it existed prior to the fourth year of the reign of James I. (March 23, 1606). The statute of 9 Anne, chapter 20, was enacted in 1710.

<sup>3</sup>People v. Baker, 35 Barb. 105; Morgan v. Fleming, 24 W. Va. 186; Phoenix Iron Co. v. Com., 113 Pa. St. 563; Com. v. Allegheny (Com'rs), 32 Pa. St. 218; United States v.

Clark County, 95 U. S. 769; Barney v. State, 42 Md. 480; Vail v. People, 1 Wend. 38; Commercial Bank v. Canal Commissioners, 10 Wend. 25.

<sup>4</sup>State v. Newman, 91 Mo. 445; State v. Jacksonville (Mayor), 22 Fla. 21; State v. Marks, 74 Tenn. 12; Ward v. Flood, 48 Cal. 36; People v. Fairman, 91 N. Y. 385; State v. Smith, 104 Mo. 661.

<sup>5</sup>People v. Westchester Co. (Supervisors), 73 N. Y. 173; Attala Co. (Board Police) v. Grant, 9 Sm. & Mar. 77; State v. Newman, 91 Mo. 445.

<sup>6</sup>People v. San Francisco (Sup'rs), 27 Cal. 655.

<sup>7</sup>People v. Pritchard, 19 Mich. 470.

is denied, a peremptory writ will not issue on the pleadings.<sup>1</sup> The overruling of a motion for a peremptory writ of *mandamus* on the return is ordinarily not a final judgment, but merely a refusal of the writ till a trial on the merits.<sup>2</sup> Where a *mandamus* proceeding is allowed to stand on the petition and answer,<sup>3</sup> or on the petition and answer to show cause,<sup>4</sup> which is equivalent to a motion for a peremptory writ on the return, the allegations of the answer, not being controverted, must be taken as true.

§ 286. **Subject continued.**—The same rules are applicable to a demurrer filed in a *mandamus* proceeding as when filed in any other legal proceeding. The demurrer to a return confesses the allegations of the return and every material allegation of the writ not denied or confessed and avoided by the return.<sup>5</sup> It also runs back to the first defective pleading, and though the return be defective, yet judgment will be rendered against the party who made the first error in substance in his pleading.<sup>6</sup> When on demurrer a part of the return is found to be bad and a part to be good, the judgment thereon must be for the respondent,<sup>7</sup> but the relator may afterwards have leave to traverse the good part of the return if necessary.<sup>8</sup> A motion for a peremptory writ on the return, being merely a substitute for a general demurrer, is subject to the same rules.

§ 287. **Amendment of return.**—If the motion to quash, or the demurrer to the return, is sustained, the respondent, if he so desires, will under the present practice be allowed to amend his return.<sup>9</sup>

<sup>1</sup> *People v. Alameda Co.* (Sup'rs), 45 Cal. 395.

<sup>2</sup> *Booth v. Strippleman*, 61 Tex. 378.

<sup>3</sup> *Aplin v. Midland Co.* (Sup'rs), 84 Mich. 121.

<sup>4</sup> *Farnsworth v. Kalkaska Co.*, 56 Mich. 640; *Murphy v. Reeder T. Treas.*, 56 Mich. 505.

<sup>5</sup> *State v. Lean*, 9 Wis. 279.

<sup>6</sup> *People v. Baker*, 35 Barb. 105; *People v. Fulton* (Sup'rs), 14 Barb. 53; *State v. Milwaukee Ch. Com.*,

47 Wis. 670; *Commercial Bank v. Canal Com'rs*, 10 Wend. 25; *Morgan v. Fleming*, 24 W. Va. 186; *Doolittle v. Co. Court*, 28 W. Va. 158; *People v. McCormick*, 106 Ill. 184; *People v. Hatch*, 33 Ill. 9.

<sup>7</sup> *Q. v. New Windsor (Mayor)*, 7 A. & E. (N. S.) 908.

<sup>8</sup> *Q. v. North Midland R. R.*, 11 A. & E. 955; *Q. v. Dover (Mayor)*, 11 A. & E. (N. S.) 260.

<sup>9</sup> See § 294.



§ 288. **Reply to the return.**—In case the demurrer to the return is overruled, the decisions of the American courts are not uniform on the question whether the relator is entitled to put in a reply traversing the allegations of the return. Most of the courts, though the matter is often regulated by statute, allow the relator to put in a reply.<sup>1</sup> It has also been held to be discretionary with the court, and that such action should be allowed when justice seems to demand it, but not otherwise.<sup>2</sup> The reply should traverse or confess and avoid the facts set up in the return.<sup>3</sup> Such traverse is only necessary when the return makes an independent averment of facts on which the relator wishes to take issue; if the return is merely a denial of the allegations contained in the petition or writ, no reply is necessary.<sup>4</sup> The traverse to the return must be single, direct and positive.<sup>5</sup> The object of the reply is to enable the relator to traverse or confess and avoid the return, when it, in the first instance, sufficiently answers the writ, and not to repeat material allegations previously made which have been left entirely unanswered.<sup>6</sup> When by statute the pleadings are confined to the writ and the return, all allegations of new matter contained in the return are considered to be traversed. Where the reply is evasive, it may be treated as though it admitted the facts charged.<sup>7</sup>

§ 289. **Reply and subsequent proceedings.**—The statute of 9 Anne, chapter 20, provided that the return might be traversed and the proceedings should be continued in the same manner as though it were an action for a false return. This statute has generally been adopted as a part of the law or has been re-enacted in America.<sup>8</sup> The pleadings are regulated by the laws of the states relative to suits in the

<sup>1</sup> State v. Jones, 10 Iowa, 65.

<sup>5</sup> Harwood v. Marshall, 10 Md.

<sup>2</sup> People v. McCormick, 106 Ill. 184.

<sup>6</sup> State v. Lean, 9 Wis. 279.

<sup>3</sup> State v. Supervisors (Board), 64 Wis. 218; Phoenix Iron Co. v. Com., 113 Pa. St. 563.

<sup>7</sup> State v. Newman, 91 Mo. 445.

<sup>8</sup> Fisher v. Charleston, 17 W. Va. 595.

<sup>4</sup> State v. Pierce Co. (Sup'rs), 71 Wis. 321.

courts,<sup>1</sup> and the rules of pleading applicable to civil suits apply to *mandamus* proceedings.<sup>2</sup> Where a reply is allowed to the return,<sup>3</sup> if it does not traverse, nor confess and avoid the material facts stated in the return, but takes issue on immaterial questions, it is bad on demurrer.<sup>4</sup>

§ 290. **Trial by jury.** — The statute of 9 Anne, chapter 20, provided that the issues of fact in a *mandamus* proceeding should be tried by a jury.<sup>5</sup> In adopting that statute, the American courts have not considered themselves bound by all of its provisions, and some of the courts, on the theory that a *mandamus* is intended to be a speedy proceeding, have denied the right of a trial by jury,<sup>6</sup> but generally a trial by jury is allowed in accordance with the provisions of this statute,<sup>7</sup> or because the local statute specially so provides.<sup>8</sup> It has been held that it is discretionary with the court whether a jury shall be allowed to pass on the issues of fact.<sup>9</sup> Also by statute the right to a jury trial as to the issues of fact has been confined to certain cases.<sup>10</sup> Appellate courts generally in such cases send the issues of fact to some court of general jurisdiction to be there tried by a jury, with orders to certify the verdict to

<sup>1</sup> In some states the only pleadings allowed are the writ and the answer. *Crans v. Francis*, 24 Kan. 750; *Long v. State*, 17 Neb. 60.

<sup>2</sup> *Silver v. People*, 45 Ill. 224.

<sup>3</sup> *Maddox v. Graham*, 2 Metc. (Ky.) 56.

<sup>4</sup> *State v. Eaton*, 11 Wis. 29.

<sup>5</sup> *Q. v. St. Pancras (Directors of Poor)*, 7 A. & E. 750; *Shrewsbury v. Kynaston*, 7 Bro. P. C. 396; *Reg. v. Fall*, 1 Q. B. 636.

<sup>6</sup> *Castle v. Lawlor*, 47 Conn. 340; *State v. Suwannee Co. (Com'rs)*, 21 Fla. 1.

<sup>7</sup> *People v. Bd. Educ.*, 127 Ill. 613; *State v. Burnsville T. Co.*, 97 Ind. 416; *Burnsville T. Co. v. State*, 119

Ind. 382; *People v. Bd. Police*, 107 N. Y. 235; *Frey v. Michie*, 68 Mich. 323; *Thompson v. U. S.*, 103 U. S. 480; *Com. v. McCandless*, 129 Pa. St. 492; *Savannah (Mayor) v. State*, 4 Ga. 26; *Noble Co. (Com'rs) v. Hunt*, 33 Ohio St. 169.

<sup>8</sup> *Weber v. Zimmerman*, 23 Md. 45; *Maddox v. Graham*, 2 Metc. (Ky.) 56; *State v. Pierce Co. (Sup'rs)*, 71 Wis. 321; *State v. Chicago, etc. R. R.*, 38 Minn. 281.

<sup>9</sup> *State v. Marks*, 74 Tenn. 12; *State v. Goodfellow*, 1 Mo. Ap. 495. So provided by statute. *Chumasero v. Potts*, 1 Mont. 242.

<sup>10</sup> *Roscommon v. Midland Sup'rs*, 49 Mich. 454.

such courts.<sup>1</sup> By consent of the parties a jury may be dispensed with.<sup>2</sup> In some cases the questions of fact have been referred to a referee for decision.<sup>3</sup> When, however, there are no issues of fact to be decided, a jury is properly refused.<sup>4</sup>

§ 291. **Relator must prove his right to all he asks for.** It is a well-established rule in *mandamus* proceedings that the relator must prove himself entitled to every claim and to all the redress which he seeks in his writ. If he fails to establish any part of his claim, or if his demand is broader than the provisions of the law, his application will be denied *in toto*.<sup>5</sup> So if a *mandamus* is asked against two persons, and can only be sustained against one, it will be refused as to both.<sup>6</sup> Some courts, however, have concluded to depart from the old rule, which was due to the fact that no amendments as to material matters were allowed in such proceedings, and no longer require the relator to prove all of his claims. They assert, and very properly, that there should be no difference in this regard between a *mandamus* and any other proceeding, and that this remedy should be applied rationally. A *mandamus* to levy a tax to pay highway orders was granted, though as to some of the orders the relator failed to prove his right to have a tax levied for their payment.<sup>7</sup> A *mandamus*, granted by a lower court to a city controller to draw his warrant on the city

<sup>1</sup> Calaveras Co. v. Brockway, 30 Cal. 325; People v. Alameda Co. (Sup'rs), 45 Cal. 395.

<sup>2</sup> Milliken v. Weatherford (City), 54 Tex. 388; People v. Finger, 24 Barb. 341; Calaveras (County) v. Brockway, 30 Cal. 325.

<sup>3</sup> State v. Columbia, 22 S. C. 582; Newman v. Scott Co. (Just.), 1 Heisk. 787; Rice, etc. Co. v. Worcester (City), 130 Mass. 575.

<sup>4</sup> Lyman v. Martin, 2 Utah, 136.

<sup>5</sup> Reg. v. Tithe Com'rs, 19 L. J. Q. B. 177; King v. St. Pancras (Ch.

Trustees), 3 A. & E. 535; King v. St. Pancras (Ch. Trustees), 6 A. & E. 314; Q. v. East, etc. Docks, 2 El. & Bl. 466; State v. Kansas City, etc. R. R., 77 Mo. 143; State v. Einstein, 46 N. J. L. 479; People v. Baker, 35 Barb. 105; Chance v. Temple, 1 Iowa, 179; Fisher v. Charleston (Mayor), 17 W. Va. 628; Kemerer v. State, 7 Neb. 130.

<sup>6</sup> People v. Yates, 40 Ill. 126. See § 234a.

<sup>7</sup> Hosier v. Higgins Town Board, 45 Mich. 340.

treasurer for bills which he had approved, and on the city treasurer to pay such warrants, was dismissed as to the treasurer because he was not in default, but was affirmed as to the controller.<sup>1</sup> Where a writ of *mandamus* asked for slightly more money than the town treasurer had in his possession, the peremptory writ was issued for the amount he admitted he had on hand, because he claimed to be the custodian of the fund and had refused to pay anything.<sup>2</sup> Where the courts allow the relator to amend his pleadings in substantial matters,<sup>3</sup> the pleader can avoid all disastrous consequences from a variance between his allegations and his proof by obtaining the permission of the court to make the proper amendments. The conduct of the trial of a *mandamus* proceeding differs in no respect from the trial of any civil action. The matters charged in the alternative writ, or in the petition when the alternative writ is dispensed with, which are denied by the respondent, must be proved by the relator; and matters in avoidance alleged in the return, if denied by the relator, must be proved by the respondent.<sup>4</sup>

§ 292. General rules of practice and of pleading as applicable to *mandamus* proceedings.—The rules of pleading and of practice are considered to be applicable to *mandamus* proceedings except as to the certainty required in the writ and return, and except as to amendments, and more especially after the proceedings have under the statute of 9 Anne been assimilated to an action for a false return. Such is the drift of the decisions where statutes controlling those questions had not been adopted. The courts have decided that, on failure to prosecute, a nonsuit may be granted,<sup>5</sup> a respondent may have leave to withdraw his return,<sup>6</sup> a new trial may be granted,<sup>7</sup> a motion in arrest of

<sup>1</sup> State v. Mount, 21 La. An. 352. Under the provisions of a practice act a similar decision was rendered. People v. San Francisco (Sup'rs), 27 Cal. 655.

<sup>2</sup> People v. Mahoney, 30 Mich. 100. Q. B. 458.

<sup>3</sup> See *post*, § 294.

<sup>4</sup> Newman, Ex parte, 81 U. S. 152.

<sup>5</sup> King v. Stafford, 4 T. R. 689.

<sup>6</sup> Rex v. Barker, 3 Burr. 1379.

<sup>7</sup> Q. v. Manchester (Council), 9

judgment may be allowed,<sup>1</sup> and a judgment *non obstante veredicto* may be granted.<sup>2</sup> Also, when it is found necessary, an *alias* or *pluries* peremptory *mandamus* may be awarded.<sup>3</sup> When on a trial the judgment is for the defendants, the judgment should be, it is considered by the court that the defendants go without day and recover of the petitioners their costs.<sup>4</sup>

§ 293. Amendments under the early practice.—Originally great strictness was required in *mandamus* proceedings, and any error was fatal to the party making it. If the relator made a mistake, the proceedings would be dismissed; if the error was on the part of the respondent, the peremptory writ would be granted. Mere formal errors, such as a mistake in an affidavit as to the title of the cause or as to the jurat, might be corrected, but no errors of substance could be corrected.<sup>5</sup> The rule was almost universal, that the court would not allow a party to succeed on a second application, who had previously applied for the very same thing without coming properly prepared, when he urged no ground for relief which he might not have urged before.<sup>6</sup> Where a rule on a corporation to show cause why a *mandamus* should not issue to it was refused, because there had been no demand and refusal, the court refused a new rule to the same effect after a demand and refusal had occurred, stating that it would not have the same application renewed from time to time.<sup>7</sup> The alternative writ was allowed to be amended at any time before it was traversed, but not afterwards.<sup>8</sup> The court would mould the

<sup>1</sup> Pees v. Leeds (Mayor), Stra. 640; People v. Com'rs Highways, 52 Ill. 498. *Contra* as against the respondent. People v. Finger, 24 Barb. 341.

<sup>2</sup> Q. v. Stamford (Mayor), 6 Ad. & E. (N. S.) 433; Q. v. St. Pancras (Directors of Poor), 7 A. & E. 750. *Contra*, People v. Metrop. Police (Bd.), 26 N. Y. 316.

<sup>3</sup> People v. Delaware Co. (Sup'rs), 45 N. Y. 196.

<sup>4</sup> Tucker v. Iredell (Just.), 1 Jones, 451; State v. Deane, 23 Fla. 121.

<sup>5</sup> Q. v. Great Western R. R., 5 Ad. & E. (N. S.) 597.

<sup>6</sup> Q. v. Manchester, etc. R. R., 8 A. & E. 413, 427; Q. v. Great Western R. R., 5 A. & E. (N. S.) 597; Q. v. Pickles, 3 A. & E. (N. S.) 599.

<sup>7</sup> Thompson, *Ex parte*, 6 A. & E. (N. S.) 721.

<sup>8</sup> Reg. v. Clitheroe, 6 Mod. 133;

rule to show cause why a *mandamus* should not issue,<sup>1</sup> but would not mould the alternative writ itself.<sup>2</sup>

§ 294. **Amendments under the present practice.**—Of later years this great strictness has been relaxed, which of itself was entirely unnecessary after the statute of 9 Anne, chapter 20. On the argument on a *concilium* of the validity of the return, the relator, at the suggestion of the court, was allowed to amend the alternative writ by inserting an allegation that the respondent was notified of a certain order and refused to obey it.<sup>3</sup> It is even said that the rule now adopted in England is to allow amendments at any time when such a course will promote justice.<sup>4</sup> In America, either by special statute or by subjecting *mandamus* proceedings to the general statutes relative to amendments of pleadings,<sup>5</sup> or by the adaptation by the court of the proceedings in *mandamus* to its ideas of equity,<sup>6</sup> amendments will be granted at any time when such a course will promote justice.<sup>7</sup> But the relator cannot by amendment of his alternative writ substitute a new and wholly different cause of action, since this is contrary to the rules of pleading.<sup>8</sup> Nor is the privilege of amending confined to the relator, but the respondent may avail himself thereof,<sup>9</sup> and

King v. Stafford, 4 Term, 689; People v. Baker, 35 Barb. 105; Com. v. Pittsburgh (Sel. Coun.), 34 Pa. St. 496.

<sup>1</sup> King v. St. Pancras (Ch. Trustees), 3 A. & E. 535.

<sup>2</sup> King v. St. Pancras (Ch. Trustees), 3 A. & E. 535; State v. Act. Board Aldermen, 1 Rich. (N. S.) 30.

<sup>3</sup> Q. v. Newbury, 1 Q. B. 751, 758.

<sup>4</sup> Com. v. Pittsburgh (Sel. Coun.), 34 Pa. St. 496.

<sup>5</sup> State v. Milwaukee (City), 22 Wis. 397; People v. La Grange (Town Board), 2 Mich. 187; State v. Baggott, 96 Mo. 63; Taylor v. Moss, 35 Mo. Ap. 470; People v. Baker, 35 Barb. 105; State v. Pierce Co. (Sup'rs), 71 Wis. 321; State v. Sla-

vin, 11 Wis. 153; Meyer v. Dubuque (City), 43 Iowa, 592; State v. Bailey, 7 Iowa, 390; State v. Warner, 55 Wis. 271.

<sup>6</sup> United States v. Union P. R. R., 4 Dill. 479; State v. Gibbs, 13 Fla. 55; Lee Co. v. State, 36 Ark. 276; State v. Cheraw, etc. R. R., 16 S. C. 524; State v. Act. Bd. Aldermen, 1 Rich. (N. S.), 30; Arberry v. Beavers, 6 Tex. 457; Morris v. State, 94 Ind. 565; School Dist. v. Landerbaugh, 80 Mo. 190.

<sup>7</sup> Com. v. Pittsburgh (Sel. Coun.), 34 Pa. St. 496; State v. Rahway (Assess. of Taxes), 51 N. J. L. 279.

<sup>8</sup> Wheeler v. Northern C. I. Co., 10 Colo. 583.

<sup>9</sup> State v. Padgett, 19 Fla. 518.

it has even been allowed to him after exceptions were filed to his return,<sup>1</sup> after a motion was made to quash his return,<sup>2</sup> and during the argument for a judgment on the verdict, when issue had been taken on an immaterial point.<sup>3</sup> The amendment is optional on the part of the respondent, and he will not be compelled on motion to amend his return.<sup>4</sup> The only exception is, that a peremptory writ of *mandamus* is not amendable, and the rule is that the peremptory writ must follow the alternative writ.<sup>5</sup> The alternative writ may be properly moulded or amended, and the peremptory writ may be issued in conformity to the amended alternative writ.<sup>6</sup> Where, on appeal from a decree awarding a peremptory *mandamus*, the decree was adjudged to be erroneous, the court remanded the cause with permission to the relator to amend his alternative writ, and with directions to issue the peremptory writ if such amendments were made.<sup>7</sup>

§ 295. All the issues must be disposed of before the peremptory writ will issue.—If on the trial the relator shows that his claims are well founded, and that he is entitled to all the remedies he asks, a peremptory *mandamus* will issue in his favor. The court will not order a peremptory writ on a part of the record; all the issues presented by the return must first be disposed of.<sup>8</sup> Where upon the overruling of the demurrer filed by one of the respondents, the relator was entitled to a peremptory writ of *mandamus* against him, the court refused to issue it till the return filed by the other respondent had been disposed of.<sup>9</sup>

<sup>1</sup> *Springfield v. Hampden (Co. waukee (City)*, 22 Wis. 397; *State v. Com'rs*), 10 Pick. 59. *Baggott*, 96 Mo. 63.

<sup>2</sup> *King v. London Dock Co.*, 5 A. & E. 163, note a. <sup>7</sup> *State v. Francis*, 95 Mo. 44; *Columbia Co. (Com'rs) v. King*, 13 Fla. 451.

<sup>3</sup> *State v. School Land Com'rs*, 9 Wis. 200. <sup>8</sup> *Q. v. Baldwin*, 8 Ad. & E. 947; *Gregg v. Pemberton*, 53 Cal. 251.

<sup>4</sup> *King v. Marriott*, 1 D. & R. 166. <sup>9</sup> *State v. Bergen (Freeholders)*, 52 N. J. L. 313.

<sup>6</sup> *State v. Rahway (Assess. of Taxes)*, 51 N. J. L. 279; *State v. Mil-*

§ 296. **How far the peremptory writ must conform to the alternative.**—This is an extraordinary remedy, and the relator is strictly required to prove his claim to every remedy he has asked. The rule has always been that the peremptory writ must conform strictly to the alternative writ,<sup>1</sup> except that the words containing an order to show cause why the writ has not been obeyed should be omitted.<sup>2</sup> If the relator fails to prove that he is entitled to all the remedies he asked, the writ will be refused, though he may show that he is entitled to a part of what he asks.<sup>3</sup> The rule, that the peremptory writ must conform strictly to the alternative writ, is correlative to, or a necessary sequence of, the rule, that the relator must prove that he is entitled to all he has asked; and both rules were established at a time when this writ was looked upon as a high prerogative writ, only to be used in extreme cases, and when the greatest strictness and accuracy of expression were required. Some of the courts have now modified the rule, and are content if the peremptory writ conforms substantially to the alternative writ. An alternative writ, issued on July 5th, ordered the holding of an election within forty days thereafter. The peremptory writ, issued on August 1st, commanded the respondents to order an election to be held under the local option law, as in the alternative writ set forth, so soon as

<sup>1</sup>State v. Kansas City, etc. R. R., 77 Mo. 143; School District v. Landerbaugh, 80 Mo. 190; State v. Cheraw, etc. R. R., 16 S. C. 524; Fisher v. Charleston (Mayor), 17 W. Va. 628; State v. Holladay, 65 Mo. 76; State v. Beloit (Sup'rs), 20 Wis. 79; State Board of Educ. v. West Point, 50 Miss. 638; State v. Johnson Co. (Board of Equal.), 10 Iowa, 157; State v. Gibbs, 13 Fla. 55; State v. Bergen (Freeholders), 52 N. J. L. 313; Chance v. Temple, 1 Iowa, 179; Q. v. East, etc. Docks, 2 El. & Bl. 466.

<sup>2</sup>State v. Johnson Co. (Judge), 12 Iowa, 237.

<sup>3</sup>State v. Union (Township), 43 N. J. L. 518; Texas, etc. R. R. v. Jarvis, 80 Tex. 456; 15 S. W. Rep. 30; State v. Field, 37 Mo. Ap. 83. In Ohio by virtue of statutory provision a peremptory writ may issue to enforce some of the acts called for in the mandatory part of the alternative writ, unless there be such dependence between the various things asked for that all must stand or fall together. State v. Crites (Ohio, Feb. 24, 1891), 26 N. E. Rep. 1052.



the same could be held under said law. The two writs were considered to be substantially the same.<sup>1</sup> The insertion in the peremptory writ of the title of the statute under which the respondent was required to act, which was omitted in the alternative writ, was considered to be no variance, since the law implied it.<sup>2</sup> The peremptory writ may vary the details as to the mode of doing the act required, provided it does not materially enlarge the substantial terms of the alternative writ, nor exceed them beyond adding merely incidental requirements.<sup>3</sup> Where the peremptory writ was more specific than the alternative writ in setting out a form of preferred stock to be issued, it was held that the two writs substantially agreed.<sup>4</sup> It has been held that the court may grant the peremptory writ in any form consistent with the case made by the complaint and embraced within the issues.<sup>5</sup> So if more than one act is required in order to obey the peremptory writ, the court may continue the cause from time to time, till all such acts are performed, and all further orders deemed necessary and subsequently made by the court have been obeyed.<sup>6</sup>

§ 297. **When the peremptory writ will be quashed or disobedience of it excused.**—Strictly there is no return to a peremptory writ of *mandamus*, but a certificate of perfect obedience and due execution of the writ,<sup>7</sup> which is made to the court at the time designated in the peremptory writ. The court may, however, on application, grant a rule *nisi* to show cause why the peremptory writ should not be quashed.<sup>8</sup> Where the court was convinced that the officers

<sup>1</sup> State v. Schmitz, 36 Mo. Ap. 550.

<sup>2</sup> State v. Rahway (Assess. of Taxes), 51 N. J. L. 279.

<sup>3</sup> People v. Dutchess, etc. R. R., 58 N. Y. 152.

<sup>4</sup> State v. Cheraw, etc. R. R., 16 S. C. 524.

<sup>5</sup> State v. Weld, 39 Minn. 426.

<sup>6</sup> Palmer v. Jones, 49 Iowa, 405.

<sup>7</sup> 3 Black. Com. 110; Q. v. Poole (Mayor), 1 Q. B. 616; Sedberry v.

Chatham Co. (Board of Com'rs), 66

N. C. 486; State v. Johnson Co. (Judge), 12 Iowa, 237; Reg. v. Hudson, 9 Jur. 345; Weber v. Zimmerman, 23 Md. 45; People v. Barnett (Sup'rs), 91 Ill. 422; State v. Smith, 9 Iowa, 334; Com. v. Taylor, 36 Pa. St. 263; Drew v. McLin, 16 Fla. 17.

<sup>8</sup> Reg. v. Hudson, 9 Jur. 345.

had not the legal power to do the act commanded, it granted the motion to quash the peremptory writ.<sup>1</sup> The peremptory writ may also be quashed on motion, if it is in excess of the alternative writ or of the rule made absolute on cause shown, or if the court is convinced on any ground that it ought not to have been issued.<sup>2</sup> It may be quashed, if it was improvidently,<sup>3</sup> prematurely, improperly or unnecessarily issued, or if on its face it is bad in substance, or if it be impossible to obey it,<sup>4</sup> or if after its issuance it has become improper or impossible to do the act commanded.<sup>5</sup> When the peremptory writ has been unfairly obtained, as by a violation of an agreement to stay the proceedings, it will be set aside on motion.<sup>6</sup> Should a statute be enacted after the issuance of the peremptory writ forbidding obedience or making obedience impossible, such new matter will of necessity be a sufficient return if the statute be constitutional.<sup>7</sup> All that is necessary in the peremptory writ is, that the order describe the act to be done with reasonable certainty, that the defendant may know what to do. If the defendant in good faith desires to comply with the order, but is unable to do so from the uncertainty of the mandate, the court will no doubt relieve him.<sup>8</sup> Though the judges of an inferior court do not obey the mandate of the superior court, and thereby subject themselves to an attachment, yet if their return to the writ shows that it was no intentional contempt, it is proper to issue an *alias* writ instead of an attachment.<sup>9</sup> It is a sufficient return to a peremptory writ, that the act commanded has been done, though not by the defendant personally.<sup>10</sup> If the writ, when fully

<sup>1</sup> Long, In re, 14 L. J. Q. B. 146; Co., 11 B. Mon. 143; State v. Jones, State v. Johnson Co. (Judge), 12 1 Ired. 414.  
Iowa, 237; Weber v. Zimmerman, 23 Md. 45.

<sup>2</sup> State v. Rahway (Assessors of Taxes), 51 N. J. L. 279.

<sup>3</sup> State v. Johnson Co. (Judge), 12 Iowa, 237.

<sup>4</sup> Weber v. Zimmerman, 23 Md. 45.

<sup>5</sup> Clarke Co. (Just.) v. Paris, etc.

<sup>6</sup> Everitt v. People, 1 Caines, 8.

<sup>7</sup> Sedberry v. Chatham Co. (Board of Com'rs), 66 N. C. 486.

<sup>8</sup> People v. Norstrand, 46 N. Y.

375.

<sup>9</sup> Woodruff, Ex parte, 4 Ark. 630.

<sup>10</sup> United States v. Kendall, 5 Cranch, C. C. 385.

executed, does not effectuate the purpose, the court will award a second or auxiliary writ to complete the act begun and to administer complete justice.<sup>1</sup>

§ 298. **Attachment for making no return to or for not obeying a peremptory writ.**—If no return is made to the peremptory writ the court will grant an attachment against those persons to whom the writ was directed,<sup>2</sup> or an *alias* peremptory writ, or an order to show cause why an attachment should not issue.<sup>3</sup> Where one of the respondents, at the time when they were required to make a return, made a return that he was willing to obey the peremptory writ, but the other two, who with him constituted the board, refused to do so, the court ordered the respondents to make a sworn return, and that the two delinquent respondents show cause why they should not be attached for contempt.<sup>4</sup> A motion for an attachment for not making a return to a peremptory writ of *mandamus* was granted, but was refused as to some of the respondents who had not the power to do the act desired.<sup>5</sup> So if the peremptory writ is not obeyed, an attachment against the respondent will be granted.<sup>6</sup> When an attachment is sought for disobedience of a peremptory writ of *mandamus*, the motion therefor is supported by affidavits, and the court grants an order to show cause why an attachment should not issue.<sup>7</sup>

§ 299. **The peremptory writ must be fairly and honestly complied with.**—There must be a fair and honest compliance with the writ, and the court may grant a rule to show cause why the return should not be quashed as evasive and fraudulent, informal, insufficient,<sup>8</sup> or frivolous and purposely made to avoid the justice of the court, and upon a hearing may order a new return to be made and

<sup>1</sup> *Rex v. Water Eaton* (Lord of Manor of), 2 J. P. Smith, 55.

<sup>2</sup> *Buller's Nisi Prius*, 197; *King v. Fowey* (Mayor), 5 Dow. & Ry. 614.

<sup>3</sup> *Fry v. Montgomery Co.* (Com'rs), 82 N. C. 304; *State v. Alachua Co.* (Canv.), 17 Fla. 9.

<sup>4</sup> *United States v. Buchanan Co.*, 5 Dil. 235.

<sup>5</sup> *President v. Elizabeth* (Mayor), 40 Fed. R. 799.

<sup>6</sup> *Buller's Nisi Prius*, 197, 198.

<sup>7</sup> *Q. v. Poole* (Mayor), 1 Q. B. 616.

<sup>8</sup> *State v. Griscom*, 3 Halst. 136.

also that the respondent show cause why he should not be attached for contempt of court.<sup>1</sup> A peremptory writ to restore A. to an office is obeyed by an actual restoration, and a return that such restoration has been made is sufficient, though at the time of such restoration the respondents notified A. to show cause why he should not be displaced for misdemeanors committed by him, which were specified, and many or most of which had already been urged in their return to the writ as the causes of his removal.<sup>2</sup>

**§ 300. Defenses which may be urged against an attachment on the hearing of a motion to show cause why an attachment should not issue for disobeying a peremptory mandamus.**—When a rule has been granted to show cause why an attachment should not issue for a failure to make a return to the alternative writ, or to obey a peremptory writ of *mandamus*, the respondent is at liberty to show any excuse he may have for such disobedience, and if the excuse is sufficient in the eyes of the court the writ of attachment will not issue. An answer to a rule to show cause why the county commissioners should not be attached for not obeying a peremptory writ, ordering them to pay a judgment, that the entire fund which could be raised by taxation was required to meet the expenses of an economical administration of the county, was considered to be sufficient, since private interests must give way to public interests.<sup>3</sup> A motion was made for an attachment for disobedience of a peremptory writ of *mandamus*. It appeared by the answer, that by a change in the law new questions were presented, which were not involved in the former decision. The court held that an officer acting in good faith, according to his best judgment as to the effect of such change, ought not to be punished by attachment, even if mistaken

<sup>1</sup>King v. Robinson, 8 Mod. 336;      <sup>2</sup>Reg. v. Ipswich Corporation, 2 State v. Crites (Ohio, June 16, L. Raym. 1283.  
1891), 28 N. E. Rep. 178; State v.

Alachua Co. (Canv.), 17 Fla. 9;      <sup>3</sup>Cromartie v. Bladen (Com'rs), 85 N. C. 211.

President v. Elizabeth (City), 40 Fed. R. 799.

in his judgment. A new application for a *mandamus* was considered to be proper, that a new decision might be made upon the facts and law then existing.<sup>1</sup> When the operation of a peremptory writ of *mandamus* has been arrested by an arrangement between the relator and respondent, the respondent will not be attached for disobeying it, since contempt of the court cannot be imputed to him.<sup>2</sup> When the judgment of a court ordering a peremptory writ has been affirmed on appeal, and the cause has been remanded for such further proceedings as right and justice require, no attachment will issue for not obeying such peremptory writ, which was suspended by the writ of error, but the court will issue an *alias* peremptory writ.<sup>3</sup> The fact, that circumstances have changed, has been held to be sufficient cause for quashing the writ and discharging parties under attachment for disobeying it. This was the ruling where the respondents had been ordered to restore the relator to his office and functions of pastor of a religious corporation, who subsequently became disqualified for the office under the charter of the said corporation.<sup>4</sup>

**§ 301. Defects appearing on the papers, on account of which an attachment for disobedience of a peremptory writ of mandamus will be refused.**—When a party is called upon under the rule of court to show cause why an attachment should not issue against him for contempt of court in not obeying a peremptory writ, he may object to the validity of the writ, and the attachment will not issue if the writ be vicious.<sup>5</sup> A motion to make absolute a rule to show cause why an attachment should not issue was refused as to the respondent, because he had gone out of office, and as to his successor, because the rule was directed to the respondent by name, and there were no words making it applicable to his successor.<sup>6</sup> Proceedings for con-

<sup>1</sup> *State v. Harvey*, 14 Wis. 151.

<sup>4</sup> *Weber v. Zimmerman*, 23 Md. 45.

<sup>2</sup> *State v. Rahway*, 50 N. J. L. 350.

<sup>5</sup> *Q. v. Poole (Mayor)*, 1 Q. B. 616.

<sup>3</sup> *United States v. Kendall*, 5 Cranch, C. C. 385.

<sup>6</sup> *State v. Elkinton*, 30 N. J. L. 335.

tempt were brought against a school teacher for expelling a child from a public school after he had been ordered by a peremptory *mandamus* to allow the child to return to the school. His answer to the alternative writ had alleged that he had expelled the child for disobedience of a certain rule, and a demurrer thereto had been overruled. The court held that the overruling of the demurrer was a legal decision that the child might be expelled for disobeying that rule, while the issue of the peremptory writ was a decision that the child was expelled for another cause; consequently the subsequent expulsion of the child for an infraction of that rule was no disobedience of the peremptory writ.<sup>1</sup> The rule for an attachment may be discharged for defects in the affidavit for the attachment — such a defect, for instance, that the affiant could not be held for perjury — though the respondent has failed to show cause under the rule.<sup>2</sup>

**§ 302. Proceedings when party is adjudged guilty of contempt of court.**— When a party is adjudged to have been guilty of a contempt of court, it is customary to fine him, and to commit him to prison till he obeys the mandate of the court and pays the fine.<sup>3</sup> In imposing such fine for disobedience, the court may include as costs a fair compensation to the attorneys of the relator in such proceedings.<sup>4</sup> If the court had jurisdiction to render the decree, issuing a peremptory writ of *mandamus*, no matter how erroneous it is, the defendant is bound to obey it, and it is a contempt of the court to disobey it;<sup>5</sup> if, however, it had no jurisdiction to render it, there is no contempt of the court in disobeying it.<sup>6</sup> If the command in whole or in part is beyond the power of the court, the writ or its excess is void, and the court has no right to punish for contempt of its unauthor-

<sup>1</sup> Bowen v. Taylor, 127 Ind. 272.

<sup>4</sup> People v. Rochester, etc. R. R., 76

<sup>2</sup> King and Newcastle-upon-Tyne (Corp.), 1 Barn. 385.

N. Y. 294.

<sup>3</sup> People v. Barnett (Sup'rs), 91 Ill. 422.

<sup>5</sup> State v. King, 29 Kans. 607;

State v. Horner, 16 Mo. Ap. 191.

<sup>6</sup> State v. Horner, 16 Mo. Ap. 191.

ized requirements, and its proceedings in contempt for disobedience thereto are void, and the parties imprisoned for such disobedience may be released by the writ of *habeas corpus*.<sup>1</sup> Where the respondent has been brought before the court under a writ of attachment, and makes a return of obedience to the writ, the relator may reply that such obedience is a mere evasion.<sup>2</sup>

**§ 303. Proceedings for contempt of court against corporations and boards.**— If the peremptory *mandamus* was issued to a corporation, and the order of the court has been disregarded, since a corporation cannot in itself be guilty of a contempt, all proceedings instituted to punish for the contempt must be against individuals.<sup>3</sup> The officers of the corporation, or members of the board or tribunal, must be brought before the court by their individual names, that they in their official capacity may be compelled to perform the mandate, and, failing, may be attached and punished as individuals.<sup>4</sup> Whether the attachment should issue against all the members of the board or tribunal, who are required by joint action to fulfill the requirements of the writ, is a point upon which the authorities are not agreed. Some of the decisions maintain that the attachment should only issue against those members who refuse obedience to the writ;<sup>5</sup> others hold that it should issue against all the members of the board.<sup>6</sup> A further ruling has been made that, where the writ is directed to several persons in their natural characters, the attachment for disobedience must issue against all the respondents.<sup>7</sup> The authorities all agree that, when

<sup>1</sup> Rowland, Ex parte, 104 U. S. 604.

<sup>2</sup> Com. v. Sheehan, 81½ Pa. St. 132.

<sup>3</sup> Bass v. Shakopee (City), 27 Minn. 250; Maddox v. Graham, 2 Metc. (Ky.) 56.

<sup>4</sup> Eufaula (City Council) v. Hickman, 57 Ala. 388; Bass v. Shakopee (City), 27 Minn. 250; St. Louis Co. Ct. v. Sparks, 10 Mo. 117.

<sup>5</sup> Q. v. Ledyard, 1 Ad. & E. (N. S.) 616; Buller's Nisi Prius, 197, 198;

London v. Lynn, 1 H. Black. 206; State v. Judge, 38 La. An. 43.

<sup>6</sup> State v. Smith, 9 Iowa, 334.

<sup>7</sup> Buller's Nisi Prius, 197, 198; Brigenoth (Bailiffs), Case of, 2 Stra. 808.

the parties are before the court, the punishment will be proportioned to the offense, and those, who were ready to obey the mandate of the court, will not be adjudged to be in contempt.<sup>1</sup> Only one writ of attachment should issue against the members of each board or tribunal. If more than one writ is issued, they will be consolidated.<sup>2</sup> Those persons who are in office at the time the peremptory writ is issued are the parties to obey it, and they are the parties to be punished in case of disobedience.<sup>3</sup> In general, before a party can be brought into contempt, he must have personal notice.<sup>4</sup> A person, who is a party to the proceedings, is presumed to have knowledge of all of the proceedings.<sup>5</sup> When the respondents have gone out of office pending the proceedings, their successors should have notice of the proceedings prior to the institution against them of proceedings for contempt.<sup>6</sup> When the law dispenses with personal notice and allows a public notice, the parties in contempt, if they had no actual notice, can set it up in their answers.<sup>7</sup>

**§ 304. When an appeal lies in a mandamus proceeding under English law.**—Under the common law, as it existed prior to the statute of 9 Anne, chapter 20, there was no means of reviewing by appeal, writ of error, or otherwise, a judgment granting or denying a peremptory writ of *mandamus*. There were various reasons assigned for this ruling. It was said that the writ did not purport to adjudge or decide any right; that it was rather an award of an execution than a judgment; that it was a mode of compelling the performance of an admitted duty rather than a decision as to what the duty was, and that it concluded nothing and was no finality. The proceedings were determined on motion, and no issue was joined. If the return,

<sup>1</sup> Buller's *Nisi Prius*, 197, 198; *Eufaula (City Council) v. Hickman*, 57 U. S. 480.

*Ala.* 338; *State v. Smith*, 9 *Iowa*, 334; *Com'rs v. Sellew*, 99 U. S. 624.

<sup>2</sup> *Durant v. Washington Co.* (Sup'rs), *Woolw.* 377.

<sup>3</sup> *Com'rs v. Sellew*, 99 U. S. 624;

*Thompson v. United States*, 103 U. S. 480.

<sup>4</sup> *King v. Edgvean*, 3 Term R. 352.

<sup>5</sup> *King v. Fowey (Mayor)*, 5 Dow.

& Ry. 614.

<sup>6</sup> See § 238.

<sup>7</sup> *King v. Edgvean*, 3 Term R. 352.



in case a return was put in, was sufficient in law, the proceedings were suspended; if it was not sufficient, the peremptory writ was issued. The decision in such cases was considered to be merely a rule; no formal judgment was entered, and originally the proceedings were not entered up; consequently there were no such proceedings as warranted a review.<sup>1</sup> Since the passage of the statute of 9 Anne, chapter 20, the relator has been allowed to traverse the return, and if such a course is pursued, a writ of error will lie, because a final judgment may in such case be given. It was considered to be against the nature of a writ of error to lie on any judgment, save where an issue may be joined and tried, or where a judgment may be had on a joinder in demurrer. If there be a verdict or a judgment on demurrer, the successful party shall recover his costs, and upon such judgment a writ of error will lie.<sup>2</sup> If, however, the relator resorted to the summary proceedings allowed by the common law, without traversing, or pleading to, the return, no writ of error could be taken from the final judgment, since the common-law rules of proceeding were not abrogated by the statute of 9 Anne, chapter 20.<sup>3</sup> So when a court improperly dismisses an appeal on the ground that it has no jurisdiction, it may be compelled by *mandamus* to reinstate and to hear it.<sup>4</sup>

**§ 305. An appeal is granted in America in mandamus proceedings whenever the action taken is considered to be a final judgment.**—The English rule, that a *mandamus* proceeding cannot be reviewed, unless an issue of fact was made therein or there was a judgment or demurrer, has met

<sup>1</sup> *Rex v. Dublin*, Stra. 536; *S. C.* on appeal, 8 Mod. 27; *Pender v. Herle*, 3 Bro. P. C. 505; *Commercial Bank v. Canal Com'rs*, 10 Wend. 25; *People v. Brooklyn (Pres.)*, 13 Wend. 130; *New Haven, etc. Co. v. State*, 44 Conn. 376; *Layton v. State*, 28 N. J. L. 575; *Hardee v. Gibbs*, 50 Miss. 802.

<sup>2</sup> *Rex v. Dublin (Dean)*, 8 Mod. 27;

3 Black. Com. 265; *New Haven, etc. R. R. v. State*, 44 Conn. 376; *People v. Brooklyn (Pres.)*, 13 Wend. 130.

<sup>3</sup> *People v. Brooklyn (Pres.)*, 13 Wend. 130; *New Haven, etc. Co. v. State*, 44 Conn. 376; *Rex v. Dublin (Dean)*, 8 Mod. 27.

<sup>4</sup> *Regina v. Smith*, 35 Up. Can., Q. B. 518.

with but little favor in this country.<sup>1</sup> The American courts generally have, by statute, a right of review in all cases where there has been a final judgment in the court below, and they have granted such review in *mandamus* proceedings whenever they considered the action of the lower court to be a final judgment.<sup>2</sup> But in all cases there must be a final judgment before an appeal can be taken. A premature appeal will be dismissed.<sup>3</sup> Such review has been granted, when the peremptory writ was awarded on the pleadings,<sup>4</sup> or on the petition after a demurrer thereto had been sustained and the respondent had declined to plead further,<sup>5</sup> when the peremptory writ was issued after a demurrer to the return had been sustained,<sup>6</sup> and when the proceedings were dismissed on argument after a return had been made to a rule to show cause why a *mandamus* should not issue.<sup>7</sup>

**§ 306. Appeal or writ of error lies if the writ is refused on the reading of the petition.**—When the court

<sup>1</sup> Hardee v. Gibbs, 50 Miss. 802.

<sup>2</sup> Davies v. Corbin, 112 U. S. 36; United States v. Addison, 22 How. 174; Careaga v. Fernald, 66 Cal. 351; Chance v. Temple, 1 Iowa, 179; State v. Hard, 25 Minn. 460; Bean v. People, 6 Colo. 98; State v. Ottinger, 43 Ohio St. 457; State v. Lancaster County, 13 Neb. 223. In Connecticut the granting or refusing of a *mandamus* is considered to be a matter of discretion, and therefore not subject to review on appeal. Chesebro v. Babcock, 59 Conn. 213. In New Jersey the early English view has been adopted, and a review by an appellate court was refused, because the proceedings were not a civil suit for the determination of private rights, but an exercise of prerogative power, because the order awarding the writ is not in the nature of a final judgment upon

a question of right between the parties, and because by common law a writ of error did not lie, which rule had not been changed by statute or custom. It was stated that, if private rights were decided by such a proceeding, a question as to the right of review would arise, which was not presented in the case before the court. Layton v. State, 28 N. J. L. 575.

<sup>3</sup> Watts v. Port Deposit (Pres.), 46 Md. 500.

<sup>4</sup> Gregg v. Pemberton, 53 Cal. 251; Withers v. State, 36 Ala. 252.

<sup>5</sup> Lee County v. State, 36 Ark. 276.

<sup>6</sup> New Haven, etc. R. R. v. State, 44 Conn. 376.

<sup>7</sup> Hartman v. Greenhow, 102 U. S. 672; Etheridge v. Hall, 7 Port. 47; State v. Chairman County Com'rs, 4 Rich. (N. S.) 485.

upon the hearing of the application decides that, upon the allegations made, the relator is not entitled to a writ of *mandamus*, and refuses to grant either a motion to show cause or an alternative writ, the prevailing opinion in America is, that such action in a final judgment, from which an appeal or a writ of error may be taken to the appellate court.<sup>1</sup> The same rule applies when, on a hearing of the rule to show cause why a *mandamus* should not issue, the proceedings are dismissed.<sup>2</sup> Whether an appeal or a writ of error must be resorted to will depend upon the local statutes.

§ 307. **Proceedings in review in the appellate court.**—On the review of *mandamus* proceedings in an appellate court, the respondent cannot raise a defense which is not contained in his return.<sup>3</sup> Though the relator was not entitled to the peremptory writ of *mandamus* when it was granted to him, still the judgment will be affirmed if he has since become entitled to the writ.<sup>4</sup> Though a peremptory writ be ordered, and another judgment be granted for

<sup>1</sup> *Ex parte De Groot*, 6 Wall. 497; *Brashear v. Mason*, 6 How. 92; *United States v. Guthrie*, 58 U. S. 284; *Ex parte Morris*, 11 Grat. 292. It has been held that, if the writ is refused upon the reading of the application, then there is no such judgment as will justify a writ of error, and that the proper remedy in such case is to bring an original *mandamus* proceeding in the appellate court. *State v. Cappeller*, 37 Ohio St. 121. The same court held that, when an issue was made up, as prescribed by law, presenting a question whether the peremptory writ should issue, and a final decision on the merits, whether such issue was of fact or of law, was determined, it was a final judgment, to review which a writ of error would lie. In a case which was submitted on an agreed statement of facts, which

was substituted in place of a formal return and demurrer thereto, an issue of law was presented, and a writ of error was considered to be the proper remedy for reviewing the judgment dismissing the proceedings. *State v. Ottinger*, 43 Ohio St. 457. Either proceeding, a writ of error or an original *mandamus* proceeding, has been considered to be allowable. *Ex parte Candee*, 48 Ala. 386. In Missouri, in such cases, no review is allowed, because no final judgment has been granted, the English rule as to the necessity of an issue of fact or law being adopted. *Shrever v. Livingston Co.*, 9 Mo. 195; *Ex parte Skaggs*, 19 Mo. 339.

<sup>2</sup> *Decatur v. Paulding*, 14 Pet. 497.

<sup>3</sup> *People v. Green*, 64 N. Y. 499.

<sup>4</sup> *State v. Hoeflinger*, 31 Wis. 257.

the costs of the proceedings, yet the two judgments are in substance and effect but one judgment, and but one appeal lies therefrom.<sup>1</sup>

§ 308. **The right to review mandamus proceedings by appeal or writ of error does not always exist.**—It does not follow that, in all cases where the parties consider themselves to be aggrieved by the decision in *mandamus* proceedings, that they may have a review thereof. There may be no court with appellate jurisdiction or with jurisdiction in such cases. The first occurs, when the proceedings were originally instituted in the court possessing the highest appellate jurisdiction. The latter occurs, when such appellate court has jurisdiction by review only over certain subjects, or with limitations as to the amount involved in litigation. Formerly a writ of error in a *mandamus* proceeding would not lie to the supreme court of the United States, unless property of a certain value was involved in the proceedings;<sup>2</sup> but the act creating the federal circuit courts of appeal, March 3, 1891, removes all limitations of that nature relative to appeals to those courts, and also relative to appeals to the United States supreme court.

§ 309. **Is peremptory mandamus suspended by an appeal with an indemnifying bond?**—In the absence of any statute specially applicable thereto, it has been a disputed question whether an appeal or writ of error, supported by a bond to protect the appellee or defendant in error, will act as a suspension of the decree for a peremptory *mandamus*. The English rule is, that such order still remains the judgment of the court, which has not been reversed, and that, to allow it to be suspended by proceedings for a review, would in many cases, owing to the short terms of office, be a denial of justice.<sup>3</sup> The same view is taken by some of the American courts.<sup>4</sup> Other courts hold that the

<sup>1</sup> *State v. Manitowoc Co. (Clerk)*, 48 Wis. 112.

<sup>3</sup> *Dublin (Dean) v. Dowgatt*, 1 Peere Williams, 348, 351; *Montague v. Dudman*, 2 Ves. Sr. 396.

<sup>2</sup> *United States v. Addison*, 22 How. 174; *Columbian Ins. Co. v. Wheelright*, 7 Wheat. 534.

<sup>4</sup> *Pinckney v. Henegan*, 2 Strob.

writ of *mandamus* has lost its prerogative character, that the action of the court in disposing of the matter is a final judgment, which judgment is like the judgment in an ordinary action at law, and therefore is stayed, as are other judgments, where a proper bond is executed for the protection of the adverse party, pending an appeal or writ of error.<sup>1</sup> The supreme court of the United States held that under the general law a proper bond of indemnity acts as a *supersedeas* during the pendency of a writ of error, and that the proper mode of reviewing the judgments of inferior courts in *mandamus* proceedings is by a writ of error.<sup>2</sup> So long as the damages awarded in a *mandamus* proceeding are confined to the costs of the writ, and so long as it is held that a *mandamus* proceeding is a bar to a suit for damages, it seems to the writer that the peremptory writ should issue,<sup>3</sup> though a writ of error has been allowed or an appeal has been taken from the judgment in favor of the relator.

§ 310. **Costs in mandamus proceedings.**—The award of costs in proceedings in *mandamus* is according to the discretion of the court. They are awarded, or divided, or refused, as under the circumstances seems proper to the court;<sup>4</sup> but it has been considered to be such a matter of course to grant the costs to the party ultimately succeeding, that very

250; *Tyler v. Hamersley*, 44 Conn. 393; *Kaye v. Kean*, 18 B. Mon. 839; *State v. Meeker*, 19 Neb. 444.

<sup>1</sup> *Griffin v. Wakelee*, 42 Tex. 513; *State v. Lewis*, 76 Mo. 370; *Churchill v. Martin*, 65 Tex. 367; *People v. Highway Com'rs*, 25 How. Pr. 257; *State v. Marshall Co. (Judge)*, 7 Iowa, 186; *Morris*, Ex parte, 11 Grat. 292; *United States v. Columbian Ins. Co.*, 2 Cranch, C. C. 266; *State v. Superior Court (Wash., Jan. 16, 1891)*, 25 Pac. Rep. 1007.

<sup>2</sup> *United States v. Addison*, 22 How. 174; *Hartman v. Greenhow*, 102 U. S. 672; *Davies v. Corbin*, 112 U. S. 36.

<sup>3</sup> See §§ 310, 311.

<sup>4</sup> *Reg. v. St. Saviours*, 7 A. & E. 925; *Reg. v. Harden*, 23 L. J. Q. B. 127; *State v. McCullough*, 3 Nev. 202; *Fox v. Whitney*, 32 N. H. 408; *State v. Bonnifield*, 10 Nev. 401; *Tuolumne County v. Stanislaus County*, 6 Cal. 440; *People v. Police Com'rs*, 108 N. Y. 475; *President v. Elizabeth (Mayor, etc.)*, 40 Fed. R. 799; *State v. Berg*, 76 Mo. 136; *Q. v. Dover (Mayor)*, 11 Ad. & E. (N. S.) 260; *State v. County Treas.*, 10 Rich. (N. S.) 40; *People v. Pritchard*, 19 Mich. 470; *Tennant v. Crocker*, 85 Mich. 328; *State v. Johnson County (Judge)*, 12 Iowa, 237.

strong grounds will be required to induce the court to depart from the general rule.<sup>1</sup> We have found but one case where damages for the injury sustained were awarded as costs, and in that case the statute so provided. The relator was expelled from a society, and, by reason thereof, had been discharged from his situation. When he was restored by *mandamus* to his society membership, he was allowed \$400 as damages and \$50 as costs.<sup>2</sup>

<sup>1</sup> *Q. v. Newbury*, 1 Q. B. 751. It to his costs. *U. S. v. Schurz*, 102 was considered that, according to U. S. 378.

the practice of the court, the suc-<sup>2</sup> *People v. Musical M. P. Union*, cessful party was always entitled 118 N. Y. 101.

## CHAPTER 20.

### MISCELLANEOUS PRINCIPLES.

- § 311. *Mandamus* bars a suit for damages, and *vice versa*.
- 312. An injunction will not issue against the prosecution of a *mandamus*.
- 313. *Mandamus* not always issued when there is no other remedy.
- 314. Statute of limitations, how far applicable.
- 315. *Res judicata* in *mandamus* proceedings.

§ 311. *Mandamus* bars a suit for damages, and *vice versa*.—An application for a writ of *mandamus* is based on the theory that the relator has no other remedy to redress the wrong he has suffered. When, however, a party brings an action to obtain damages for a wrong which he has suffered, he thereby admits that such action furnishes a compensation for the injury he has suffered. As a consequence, the two proceedings are antagonistic to each other in their applicability, and the use of one logically is a bar to the use of the other. It is accordingly held that, by bringing a suit for damages, a party waives all right to apply for a *mandamus*, and *vice versa*.<sup>1</sup> A party, who had sued for damages for wrongful expulsion from a corporation, was held to have waived all right to seek a restoration by the writ of *mandamus*.<sup>2</sup> Where, however, it was apparent that the damage suit could not be maintained, in several cases the courts have refused to consider it as a bar to a *mandamus* proceeding. A school teacher sued a township for her salary as such teacher, and obtained a judgment, which the defendant appealed. Pending such appeal, she sought to obtain the money due her by a *mandamus* proceeding. The court allowed the *mandamus* to be prosecuted, because

<sup>1</sup>Kendall v. Stokes, 3 How. 87;      <sup>2</sup>State v. Slavonska Lipa, 28 Ohio State v. Ryan, 2 Mo. Ap. 303.      St. 665.

it appeared that she had failed to take certain necessary steps before bringing her civil suit, and that, therefore, such suit must fail.<sup>1</sup> A mere colorable suit, which was not maintainable, was considered to be no bar to an application for a *mandamus*.<sup>2</sup>

§ 312. **An injunction will not issue against the prosecution of a mandamus.**—A chancery court has no authority to enjoin further proceedings in an application for a *mandamus*. “The reason is, that a *mandamus* is not a writ remedial, but mandatory. It is vested in the king’s superior court of common law to compel inferior courts to do something relative to the public. That court has a great latitude and discretion in cases of that kind; can judge of all the circumstances, and is not bound by such strict rules as in cases of common rights.”<sup>3</sup> It is said, that to allow such interference would interrupt the course of judicial proceedings, and lead to a conflict of jurisdiction, producing the greatest confusion, and tending to subvert the administration of justice.<sup>4</sup> The court which first obtains jurisdiction in any matter will not be deterred from issuing a peremptory mandate therein, by the fact that another court, in proceedings subsequently begun, has issued an injunction restraining the parties from prosecuting the matter further.<sup>5</sup>

§ 313. **Mandamus not always issued when there is no other remedy.**—In a number of instances the courts have stated that though there was a wrong and no remedy therefor, that it did not follow that the writ of *mandamus* would issue.<sup>6</sup> This at first sight seems to be a strange proposition, when it is remembered that the writ is issued

<sup>1</sup> *Apgar v. Trustees*, 34 N. J. L. 308. Washington C. Court, 10 Bush, 564; *Riggs v. Johnson Co.*, 6 Wall. 166;

<sup>2</sup> *People v. State Treas.*, 24 Mich. 468. *Weber v. Lee Co.*, 6 Wall. 210.

<sup>3</sup> *Montague v. Dudman*, 2 Ves. Sr. 396; *Columbia Co. (Com’rs) v. Bryson*, 13 Fla. 281. <sup>6</sup> *State v. Thayer*, 10 Mo. Ap. 540; *People v. Dutchess C. P. (Judges)*, 20 Wend. 658; *Ostrander, Ex parte*, 1 Denio, 679; *Ewing v. Cohen*, 63 Tex. 482.

<sup>4</sup> *Weber v. Zimmerman*, 23 Md. 45.

<sup>5</sup> *Cumberland, etc. R. R. v. Judge*



because there is no other remedy, and the absence of any other remedy is held to be a sufficient warrant for the writ.<sup>1</sup> It is well settled that, when a judicial discretion is imposed, *mandamus* is not the proper remedy whereby to review it.<sup>2</sup> There are few cases where the acts of officers acting judicially are not reviewable by *certiorari*, appeal or writ of error, and when they are not so reviewable, it is clear the law intended such action to be final. So the statement should rather be, there is no review by *mandamus* of an action by a public officer calling for the exercise of judgment or discretion, when the law intends such action to be final.<sup>3</sup> The action was considered to be final and not subject to review by *mandamus*: in the matter of licensing dram-shops, when the court was allowed a discretion;<sup>4</sup> on the question of issuing township bonds in aid of a railroad upon presentation of a petition, concerning which the assessors were to decide whether it complied with the law;<sup>5</sup> in the exclusion, without a proper hearing on the merits, of one claiming to have been elected an alderman, when by charter the common council were the final judges in such elections;<sup>6</sup> when the mayor and common council have determined that a party has sustained no damages by virtue of a condemnation of property;<sup>7</sup> when a school committee, having authority to decide upon all questions relative to the

<sup>1</sup> *Rex v. Barker*, 3 Burr. 1265; 3 Black. Com. 110; *Prop'rs St. Luke's Church v. Slack*, 7 Cush. 226; *Bradley, Ex parte*, 7 Wall. 364; *Napier v. Poe*, 12 Ga. 170; *Poor Com'rs v. Lynah*, 2 McCord, 170; *People v. New York (Mayor)*, 10 Wend. 393.

<sup>2</sup> *State v. Nelson*, 21 Neb. 572; *State v. Kendall*, 15 Neb. 262; *Cariga v. Dryden*, 29 Cal. 307; *Hoole v. Kincaid*, 16 Nev. 217; *Scripture v. Burns*, 59 Iowa, 70; *Newport (City) v. Berry*, 80 Ky. 354; *Oneida C. P. (Judges) v. People*, 18 Wend. 79; *Lewis v. Barclay*, 35 Cal. 213.

<sup>3</sup> *Wood v. Strother*, 76 Cal. 545; *Morley v. Power*, 73 Tenn. 691; *Scott v. Superior Court*, 75 Cal. 114; *Lewis v. Barclay*, 35 Cal. 213; *People v. Weston*, 28 Cal. 639; *Morton v. Compt. Gen.*, 4 Rich. (N. S.) 430; *Grier v. Shackelford*, 3 Brev. 491.

<sup>4</sup> *Whittington, Ex parte*, 34 Ark. 394.

<sup>5</sup> *Howland v. Eldredge*, 43 N. Y. 457.

<sup>6</sup> *People v. Fitzgerald*, 41 Mich. 2.

<sup>7</sup> *Smith v. Boston (Mayor)*, 1 Gray, 72.

qualifications, elections and returns of its members, have declared a seat therein vacant for want of a legal election and of qualification by the petitioner, though the committee stated in its record that the only reason for its decision was because the petitioner was a woman;<sup>1</sup> and when a visitor of a corporation or the court of a corporation having jurisdiction has acted in a case.<sup>2</sup> Where a case has once been heard by a court of justice, it cannot be said there is a denial of justice because no review is allowed by *mandamus*, appeal or otherwise. There must be some tribunal whose decision is final, and it is for the law to decide what decision shall be final. Where a superior court has not appellate jurisdiction in the case, it will not review the action of the lower court by *mandamus*.<sup>3</sup> A court dismissed an appeal from a justice of the peace because a revenue stamp was not put on the document in suit within the proper time. Whether such decision was correct could only be determined by examining the evidence, and such action would make a *mandamus* a substitute for an appeal. The writ was dismissed, though the amount was too small to authorize an appeal.<sup>4</sup> The fact that the amount was too small to permit an appeal does not authorize the issuance of this writ.<sup>5</sup> Where an appellate court dismisses a case for want of jurisdiction, it judicially determines a question incident to the proceedings, and therefore a *mandamus* will not lie to reinstate the case, though there is no other mode of reviewing such action. This writ cannot be used as a writ of error.<sup>6</sup>

§ 314. Statute of limitations, how far applicable.—  
The object of the law is to put an end to litigation, and for

<sup>1</sup> Peabody v. Boston (School Com.), 115 Mass. 383.

<sup>2</sup> 6 Bacon's Ab., title "Man.," C. 2; Lord Holt's dissenting opinion in Phillips v. Bury, 2 T. R. 356; sustained on appeal, Phillips v. Bury, 4 Mod. 106; King v. Cambridge (Chancellor), 6 T. R. 89.

<sup>3</sup> Newman, Ex parte, 81 U. S. 152;

Ewing v. Cohen, 63 Tex. 482; State v. Thayer, 10 Mo. Ap. 540; Ostrander, Ex parte, 1 Denio, 679.

<sup>4</sup> State v. Wright, 4 Nev. 119.

<sup>5</sup> Newman, Ex parte, 81 U. S. 152; Burdett, In re, 127 U. S. 771.

<sup>6</sup> People v. Garnett, 130 Ill. 340. See § 201.

that purpose statutes of limitation have been passed from time to time, which are considered to be statutes of repose. As a general rule, such statutes are not considered to apply to the writ of *mandamus*;<sup>1</sup> yet where this writ is considered to be an ordinary action at law, or the phraseology of the statute of limitations is broad enough to include it, the courts have ruled that this writ is included therein.<sup>2</sup> In their discretion, however, many courts have decided that this statute applies by analogy, and when a suit for a similar cause of action is barred, they refuse the assistance of this writ.<sup>3</sup> A *mandamus* was applied for to compel the clerk of the board of supervisors to put the county seal on a warrant which his predecessor had failed to do. More than three years had elapsed, which was the time limited for actions against officers for omission of official duty. *Mandamus* was considered to be an action for failure to perform official duty, and the writ was refused.<sup>4</sup> A *mandamus* to collect a judgment, obtained against a municipality on its bonds, is considered to be equivalent to the statutory writ of execution, and the bar of the statute against the latter is applied to the former.<sup>5</sup> Even though the judgment becomes barred

<sup>1</sup> *State v. Meagher*, 57 Vt. 398; *State v. Knight*, 31 S. C. 81; *Chinn v. Trustees*, 32 Ohio St. 236; *Klein v. Smith Co. (Bd. Com'rs)*, 54 Miss. 254.

<sup>2</sup> *Haymore v. Yadkin (Com'rs)*, 85 N. C. 268; *Auditor v. Halbert*, 78 Ky. 577; *Peoria Co. (Board Sup'rs) v. Gordon*, 82 Ill. 435; *Smith v. Bourbon Co. (Com'rs)*, 42 Kans. 264.

<sup>3</sup> *George's Creek, etc. Co. v. Co. Com'rs*, 59 Md. 255; *Territory v. Potts*, 3 Mont. 364.

<sup>4</sup> *Prescott v. Gonser*, 34 Iowa, 175.

<sup>5</sup> *United States v. Oswego (Tp.)* 28 Fed. Rep. 55. In another case the court decided otherwise, holding that the law limiting the issue

of an execution to ten years after the date of the judgment did not apply to such cases, because an execution never ran against a municipality, and besides, the judgment might be revived by a *scire facias*, but such revival gave the *mandamus* no additional force. The writ was allowed to go. *United States v. Ottawa (Bd. Aud.)*, 28 Fed. Rep. 407. The fact that the judgment could be revived would seem to render the statute of limitations inapplicable to the case, but such delay in applying for the writ, if unexplained, was a good reason for refusing the writ on account of laches. Where there was no right of revival by *scire facias*, such

after the application for the writ is filed, yet the writ will be refused, since the filing of the application does not create a lien.<sup>1</sup> Even though the statute of limitations is not recognized as having any application to this writ, yet the courts will refuse its assistance, when, according to their judgment, there has been unreasonable delay in asking for it, when such delay is unexplained and unaccounted for.<sup>2</sup> Since statutes of limitation generally do not run against the government, it has been held that they do not apply when the state, by its attorney-general, applies for this writ.<sup>3</sup>

§ 315. *Res judicata in mandamus proceedings.*—A judgment quashing a writ of *mandamus*, because it is informal or defective by omission of necessary parties or of some material fact, or because it does not disclose a case coming within the legitimate scope of the writ, is not conclusive on the parties, and is no bar to a subsequent regular proceeding.<sup>4</sup> So where a peremptory *mandamus* was issued to restore one who had been removed from office, because the return was defective, it was held not to prevent proceedings *de novo* to remove the relator from his office for his prior delinquency.<sup>5</sup> The result of *mandamus* proceedings can be no bar to subsequent proceedings on the same subject, unless there has been an adjudication on the merits.<sup>6</sup> When, however, a *mandamus* proceeding has been heard and decided on its merits, the judgment rendered is conclusive against the parties thereto, whether the issue

right having expired contemporaneously with the right to issue an execution, the right to a *mandamus* was held to be barred. *Stewart v. St. Clair Co. Ct. (Just.)*, 47 Fed. Rep. 482.

<sup>1</sup> *McAlee v. Clay Co.*, 42 Fed. Rep. 665.

<sup>2</sup> *People v. Chapin*, 104 N. Y. 96; *Chinn v. Trustees*, 32 Ohio St. 236; *State v. Knight*, 31 S. C. 81.

<sup>3</sup> *State v. Stock*, 38 Kans. 154. In

Kansas the attorney-general only appears in such cases when public interests are to be protected, and not when private interests are involved.

<sup>4</sup> *Tucker v. Iredell (Just.)*, 1 Jones, 451; *State v. Milwaukee Ch. of Com.*, 47 Wis. 670; *People v. Baker*, 35 Barb. 105.

<sup>5</sup> *King v. Taylor*, 3 Salk. 231.

<sup>6</sup> *State v. Stearns*, 11 Neb. 104.

presented was one of law or fact, in any other proceeding, whether it be legal or equitable or a proceeding by *mandamus*, and is also conclusive as to all matters directly involved and determined therein, until such decision has been reversed or set aside.<sup>1</sup> So a *mandamus* against a county or its legal representatives is conclusive against a bill in equity subsequently filed against them, as to all matters which could have been set up in the *mandamus* proceeding, though the bill is filed by other inhabitants of the county.<sup>2</sup> When a court had jurisdiction of the parties and the subject-matter in a *mandamus* proceeding, its judgment therein cannot be attacked collaterally.<sup>3</sup>

<sup>1</sup>State v. Ottinger, 43 Ohio St. 457; State v. Trammel (Mo., Nov. 9, 1891), 17 S. W. Rep. 502; State v. Hard, 25 Minn. 460; Tucker v. Iredell (Just.), 1 Jones, 451; Block v. Com'rs, 99 U. S. 686; Louis v. Brown Township, 109 U. S. 162; Washington I. Co. v. Kansas P. R. R., 5 Dill. 489. *Contra*, Burland v. N. W. M. B. Assoc., 47 Mich. 424.

<sup>2</sup>Sauls v. Freeman, 24 Fla. 209.

<sup>3</sup>State v. Trammel (Mo., Nov. 9, 1891), 17 S. W. Rep. 502.

## CHAPTER 21.

### FORMS IN MANDAMUS PROCEEDINGS.

- § 316. Entitling the petition.
- 317. Form of the body of the petition.
- 318. Verification of the petition.
- 319. Form of the alternative writ.
- 320. Requirements of the return.
- 321. Form of final judgment.
- 322. Illustrations of the necessary pleadings.

§ 316. Entitling the petition.— The courts have been disposed to ignore forms in the pleadings in *mandamus* proceedings, only requiring that the essential facts necessary should in some way be stated, no matter how informally. Owing to this very informality it seems desirable to give some examples of forms which have met the approval of the courts.

The petition may be entitled:

1. To the Honorable — Court of —,  
Or,
2. Ex parte A. B. [*the petitioner*].  
To the Honorable — Court of —,  
Or,
3. State of —, at the relation of A. B.,  
vs.  
C. D.  
To the Honorable — Court of —,  
Or,
4. A. B., Plaintiff, }  
vs. } In the — Court of —, — Term, A. D. 18—. }  
C. D., Defendant. }  
To the Honorable — Court of —.

The second form is generally used. The fourth form is proper in those states where it has been ruled that under

their laws requiring all suits to be brought in the name of the real party in interest, the name of the state cannot be used by a private relator.<sup>1</sup> Of course when the prosecuting officer institutes the proceedings, the name of the state should be used. The third form is the one suggested by the writer.<sup>2</sup>

**§ 317. Form of the body of the petition.**— The body of the petition should read:

The petition of A. B. respectfully sheweth that [*here all the facts showing the duty which was imposed upon the respondent, the rights of the relator in the matter, the demand of performance and the respondent's refusal to perform, or the facts dispensing with a demand and refusal should be stated*].

Your petitioner therefore prays that a peremptory *mandamus* may issue to the said C. D. commanding him [*here state the duty whose performance is requested*].<sup>3</sup>

The petition should be signed by the petitioner or by his counsel.

**§ 318. Verification of the petition.**— The petition must be verified. Such affidavit may read:

State of —,        } ss.  
County of —. }

A. B., the petitioner above named, being duly sworn, on his said oath deposes and says that the several matters and things in the foregoing petition stated are true in substance and in matter of fact, to the best of his knowledge, information and belief.<sup>4</sup>

A. B.

Sworn to and subscribed before me, this — day of —, A. D. 18—.

[*Officer's name and title of office.*]

<sup>1</sup> See *ante*, § 228.

<sup>2</sup> See *ante*, § 247.

<sup>3</sup> It is a common practice, instead of asking for a peremptory writ of *mandamus*, to ask for an alternative writ requiring the respondent to do the act desired or to show cause to the court at a future time designated why the writ has not been obeyed. An illustration of such an application will be found in the

pleadings given later from actual cases. The writer believes that the pleader should ask at first for the peremptory writ, the order actually given being a matter in the discretion of the court. See *ante*, § 249.

<sup>4</sup> As to how far the petitioner must swear to the absolute truth of the matters stated in his petition, see *ante*, § 248.

§ 319. **Form of the alternative writ.**—If the alternative writ is granted, being an order of court, it will be entitled:

1. State of — to — — [the respondent], Greeting.

Sometimes the name of the case is put above the order, when the writ will be entitled as follows:

2. State of ———, at the relation of ——— [*the petitioner*],  
vs.  
———— [*the respondent, giving his official title and name, or omitting his name.*] } In the ——— Court.

State of — to — — [the respondent], Greeting.

The body of the writ will read:

Whereas, it hath been related to the — court [*court in which the matter is pending*], by A. B. [*the relator*],<sup>1</sup> that [*here insert the allegations of the petition prior to the mandatory clause*]: Now, therefore, being willing that full and speedy justice should be done in the premises, we do command you that [*here insert the mandatory clause of the petition*], or that you show cause to this court, at its session at — o'clock on the — day of —, A. D. 18—, at —, why you have not done so; and have you then and there this writ, with your return that you have done as you are hereby commanded.

The writ should be attested in the manner usual with orders emanating from that court.

Some courts have adopted the following form, which the writer recommends as dispensing with all trouble in preparing the alternative writ, viz.:

The State of — to A. B. [*the respondent*], Greeting:

Whereas, on the — day of —, A. D. 18—, there was filed, and on the — day of —, A. D. 18—, presented to our — court of —, a petition praying for a writ of *mandamus*, which petition is in words and figures following, to wit:

[Then insert the petition in full, including the caption and the verification.]

<sup>1</sup> In the writ it is not the practice to state the facts absolutely, though it has been done. *Com. v. Pittsburgh (Councils)*, 34 Pa. St. 496. The ordinary statement is that it hath been represented, related or suggested to the court. *People v. Pearson*, 2 Scam. 189; *Drew v. McLin*, 16 Fla. 17; *State v. Lawrence*, 3 Kan. 95; *State v. Zanesville, etc. Co.*, 16 Ohio St. 308; *Hawkins v. More*, 3 Ark. 345; *King v. Goodrich*, 3 Smith, 388; *State v. Goll*, 32 N. J. L. 285.



And whereas, upon consideration, it was ordered that an alternative writ of *mandamus* should issue: These are therefore to command you [*here insert the prayer of the mandatory clause of the petition*], or to appear before this court on the — day of —, A. D. 18—, at — o'clock A. M., then and there to show cause, if any you have, why you have not so done.

The writ should then be attested in the mode adopted in each court for attesting its orders.

§ 320. **Requirements of the return.**— The return should be entitled by the name of the cause, viz.:

The State of —, at the relation of A. B. [ <i>the relator</i> ],	} In the — Court.
vs.	
C. D. [ <i>the respondent, giving official title</i> ].	

The return differs in no respect from the answers in any civil suit, except as to the particularity of its allegations, which has been explained before.<sup>1</sup> All motions made by the respondent or by the relator (at least after the court has granted the alternative writ) must be entitled of the cause.<sup>2</sup> The return should be signed by the respondent or by his counsel.

§ 321. **Form of final judgment.**— If upon the final hearing the peremptory writ is refused, the judgment is that the respondents go without day and recover of petitioner their costs.<sup>3</sup> If the court make any different order as to costs, the judgment will be void accordingly. If the peremptory writ issues, it issues as an order of the court, commanding the performance of the duties ordered in the alternative writ, but omitting the order to show cause, and directing the respondent, at a period named, to make a return to the court, showing his obedience to the writ.

§ 322. **Illustrations of the necessary pleadings.**— To the above forms it is deemed expedient to add the pleadings actually filed and approved by the courts in a few instances. It should be premised, however, that the omission of the title of the cause, or of the affidavit of the petition, must not be considered to be evidence that none such existed, since where no issues have been made thereon, the courts find it unnecessary to notice them.

<sup>1</sup> *Ante*, §§ 273-281.

<sup>2</sup> See § 247.

<sup>3</sup> *Ante*, § 292.

## PETITION.

To the Honorable the Judge of the Superior Court of Law in and for the County of Iredell, State of North Carolina :

The petition of Samuel Tucker respectfully sheweth to your honor, that, at the November session, 1847, of the court of pleas and quarter sessions for the county aforesaid, the justices thereof made an order, and caused the same to be entered of record, appointing Henderson Forsyth, Enos Gaither and Alexander Bailey commissioners to let and contract for the building of a bridge over the South Yadkin river, near where Belt's bridge formerly stood.

Your petitioner further sheweth that the said commissioners, in the month of January, 1848, contracted with your petitioner for building said bridge, at the place designated, according to certain written specifications, describing and establishing with great particularity the kind of a bridge, the manner of building it, and the material to be used about the same ; that the said commissioners required your petitioner to sign specifications, and the same were returned to, and are now on file in the office of, the clerk of the county court, and that, to secure the performance of the contract, your petitioner was required to and did execute a bond, with good security, in the sum of two thousand dollars, which said bond was delivered to the said commissioners for and in behalf of the county of Iredell, and returned to the court, and is now on file in the clerk's office.

And your petitioner further sheweth that the said Henderson Forsyth, Enos Gaither and Alexander Bailey, in contracting with your petitioner, only acted for and in behalf of the county, and by virtue of their appointment as commissioners as aforesaid of the county court.

And he further sheweth that the said South Yadkin river, at the place designated, is within the limits of Iredell county, and within the jurisdiction of the county court.

Your petitioner further sheweth, that it was contracted by the commissioners aforesaid to pay your petitioner the sum of seven hundred and ninety-nine dollars for building the bridge according to the said specifications.

Your petitioner further sheweth that he soon thereafter went to work, and employed a large number of hands, and, in as substantial and workmanlike manner as the specifications would admit, built and completed a bridge, which in every respect your petitioner avers corresponded to the specifications above mentioned ; that in all things he performed his contract and followed the said specifications as his guide. Your petitioner further sheweth to your honor, that the said commissioners, after viewing and examining the bridge after its completion, entirely approved the same, and made their report to the November session, 1848, of the county court, stating their examination and approval, and recommending that your petitioner be paid the sum of seven hun-

dred and ninety-nine dollars, according to agreement (which is filed as an exhibit). That upon the presentation of said report, and according to its recommendation, the justices of the court, at the said November session, 1848, made an order directing the county trustee to pay to your petitioner the sum of seven hundred and ninety-nine dollars for building the bridge as aforesaid contracted for and completed by your petitioner, a copy of which order, marked B., is herewith submitted as a part of this petition. Your petitioner further sheweth to your honor, that said bridge thereupon was opened to and used by the community as a county public bridge; and your petitioner applied to the county trustee for his pay; that said trustee deferred payment at the time for the want of the necessary county funds wherewith to discharge the same. Your petitioner further sheweth to your honor, that after said bridge had been used by the citizens of the county and the public generally, a part of said bridge fell down, not because of any deficiency in the execution of the work on the part of your petitioner, as he is fully convinced and satisfied, but entirely from the plan of the bridge itself, as prescribed in the said specifications, and your petitioner shows that it is next to impossible to make a permanent bridge on the plan proposed; for this one reason, that the pillars, built of common rough rock, without mortar or cement, and bounded and built as specified, of only four feet base, and twenty feet high, and three feet at top, are not calculated to stand and support a bridge; that your petitioner has taken the opinion of an intelligent engineer upon the plan of the pillars and bridge, and he states, unequivocally, that such a structure could not be expected to stand. And your petitioner shows to your honor, that he faithfully and to the best of his ability performed the work specified by the county, and for which he and the justices by their commissioners contracted, and that he did not contract to insure the work to be permanent, and is in no wise responsible for defects in the original plan of the work. Your petitioner further sheweth, that after said bridge had fallen in part, the justices at the February term, 1849; rescinded their former order of payment, and have instructed their county trustee not to pay your petitioner. Your petitioner shows to your honor, that he has repeatedly demanded his money, and sought to obtain it, but his demands have been and still are met with positive refusal; that, having performed his contract according to his written directions, and received an order for his money, he is now strictly entitled to receive, from the treasurer of the county, the sum of seven hundred and ninety-nine dollars, with interest on the same from the 17th November, 1848, until the same be paid; and, as he can have no relief in the premises, save by the extraordinary process of *mandamus*, he shows that he is entitled to the same; that he learns from the clerk of the county court, and so shows to your honor, that the following are the justices of the peace in and for the county of Iredell (setting them forth at large).

Your petitioner therefore prays your honor, that an alternative *man-*

*damus* may issue to the aforesaid justices, commanding them that unless they show good cause to the contrary, whenever thereunto required by this honorable court, they pay or cause to be paid, by the officers of this county, the said sum of seven hundred and ninety-nine dollars with interest thereon from the said 17th of November, 1848; that upon their failure to show such cause, they be absolutely and peremptorily commanded by this honorable court to pay to the petitioner the aforesaid sum of seven hundred and ninety-nine dollars with the interest thereon, as aforesaid.

A. and B.,

Attorneys.

North Carolina, }  
Iredell County. }

Samuel Tucker maketh oath that the several matters of fact set forth in the foregoing petition as of his own knowledge are true, and those as not of his own knowledge he believes to be true. SAMUEL TUCKER.

(Sworn to before the clerk of the superior court.)

#### RETURN.

To the Petition of Samuel Tucker, Praying a *Mandamus* against the Justices of Iredell County.

They, the said justices, make return, and for cause show respectfully to this honorable court that they, from the best of their knowledge and belief, in refusing the payment of the petitioner as alleged in his petition, have not acted in bad faith or unjustly towards him, and do not withhold from him a debt which in good conscience he can demand, but they have acted with a sole regard to their public and official duty to the county, and from a desire to protect it from an unfounded and iniquitous claim. They say it is true that at the November term, 1847, of their county court they made the order mentioned in the petition, and also that the petitioner undertook a contract to build a bridge on the South Yadkin river according to specifications in writing (the substance of which is set forth below).

They deny that the petitioner has built the said bridge in all things according to his contract and the said written specifications. They represent that, from the best of their knowledge and belief, the petitioner built the said bridge with such gross negligence and wilful unskilfulness that it is of no public utility whatever; that owing to the frail and insufficient construction of the work, one end of the bridge had crushed the abutment upon which it was supported before the petitioner had finished his work; and in less than two months afterwards, the other end crushed the abutment upon which it was supported and sunk down, and that since then the greater part of the bridge has been carried off by the waters of the stream.

These defendants show that in the petitioner's contract it is specified that "the face wall of the abutment on the south side of the river was to be started in the bottom of the river against a rock; to be four feet

thick, tapered up twenty feet high, to be three feet thick at the top for the cope; two side walls to be started fifteen feet from outside to outside; to be three feet thick at bottom, tapered to two feet at top, and the space between the walls to be filled with rock and dirt to settle them; and the abutment on the north side of the river to start forty-eight feet in the river, and to be constructed as the abutment of the south side." And they represent, from the best of their information and belief, that the face walls and side walls of the abutments were not built as specified in the terms of the contract, but that stone, without regard to their fitness in size or form, were so laid as fraudulently to present the face of the wall, when in truth, what represented walls were of unequal thickness and of a single stone, and varying with the size of the stone; and instead of rock and dirt the abutments were filled in with loose sand. These constructions started in water, from foundations loosely placed in the mud and sand, instead of at the bottom of the river against the rock, and were raised on one side of the river to the height of twenty feet. These defendants represent, from the best of their information and belief, that these pretended walls, in many parts, did not exceed a foot in thickness, and were so frail as to be totally inadequate for the support of the bridge, and for this cause they crushed and the bridge sank down and was rendered impassable and useless. They further represent, from their information and belief, that the timbers used in the construction of the said bridge were not such as are specified in the terms of the contract; — were not all of heart timber, but large portions of material pieces were white pine or sap wood. The defendants show that the petitioner, in the several particulars mentioned as well as others, has violated the terms of his contract for building said bridge, and has no just demand for the payment of the stipulated price. The defendants show that the said bridge fell down and became useless from the deficiency of the execution of the work by the petitioner, and that it was not because of any defect in the plan of said bridge as contained in said specifications. Defendants further show that it is true that two of the commissioners appointed by them to make the contract for the building of said bridge did represent to them in writing that said contract was completed according to agreement, but such representation was untrue. The petitioner and the said commissioners knew at the time it was made that it was untrue; they were all fully aware that the bridge in its construction was deficient in the particulars hereinbefore alleged, and that it was of little or no use to the public. These defendants are informed and believe that the said commissioners, before they would agree to make the said fraudulent representation to the justices concerning the structure of said bridge, knowing it to be frail and wholly insufficient, required the petitioner to put a wooden pillar, consisting of two wooden posts, upright under the main wooden structure of the bridge to support it, and that said bridge was in this condition supported by such wooden posts when they made the afore-

said representation to the defendants. The defendants believe and say that, with a knowledge that petitioner had not performed his contract, these commissioners with him fraudulently confederated to procure from these defendants an order for the payment of the stipulated price of the work, and in pursuance of this design they falsely made the above-mentioned representation, by which the defendants were misguided and deceived, and induced to make an order directing the county trustees to pay the stipulated money. The defendants believe and represent that the said certificate of the commissioners was advised, counseled and approved by the petitioner with a perfect knowledge on his part that the contract for building said bridge had not been substantially performed, and with the design of fraudulently taking and receiving money from the county without any just title to demand it. These defendants state that at the next term of their county court they rescinded the aforesaid order (it being the first opportunity they had of so doing after learning that they had been imposed upon by the petitioner), and that said defendants believed at the time, and they still believe, that they had power and authority in law so to rescind their own order. These defendants state that they are not informed that any surrender of the bridge was made to them or the public by the petitioner, nor have they surrendered or dedicated it to the public use by any special act of their own; nor have they any knowledge or belief that the aforesaid commissioners accepted it, except as the above-mentioned certificate may be evidence of acceptance.

E. P. and L. R., for Defendants.

Personally appeared Thomas A. Allison, one of the defendants, in behalf of all the justices of the county of Iredell, and maketh oath that the several matters which are set forth in the foregoing return as of their own knowledge are true, and those not set forth as of their own knowledge are true to the best of their understanding and belief.

THOMAS A. ALLISON.

Sworn to in open court.

W. H. HAYNES, Clerk.<sup>1</sup>

#### PETITION.

To the Honorable the Justices of the Supreme Court of the United States:

The petition of the Union Bank of Louisiana, a corporation duly established by the laws of the state of Louisiana, respectfully sheweth: That on the 5th day of March, 1848, your petitioner filed its bill in the district court of the United States for the district of Texas against Josiah S. Stafford and Jeannette Kirkland Stafford, his wife, whereby your petitioner sought to obtain a foreclosure of a certain mortgage, held by it on cer-

<sup>1</sup>The above petition and return considered that they might be used are taken from *Tucker v. Iredell* as models. (Justices), 1 Jones, 451, and the court

tain negro slaves, then in the possession of the said defendants; but, at the hearing in the said court, and by the decree thereof, the said bill was dismissed. And your petitioner further sheweth that from the decree of the said court, directing the dismissal of the said bill, an appeal was prayed by your petitioner to this court; and at the December term, 1851, the said decree was reversed and the cause remanded to the said district court, with directions to that court to enter a decree in favor of your petitioner; and, accordingly, such a decree was in fact rendered by the said district court, on the 25th of February, 1854, whereby it was in substance directed that the sums accruing from the hire of the mortgaged slaves, while in the custody of the receiver, *pendente lite*, amounting to \$25,879.39, should be paid by the receiver to the complainant, and credited on the total amount found to be due by the defendants, and that in case the defendants failed to pay over the balance remaining due after such credit, amounting to \$39,877.13 on the 1st day of July, 1854, they should be foreclosed of their equity of redemption, and the marshal should seize and sell the mortgaged slaves at public auction on the third day of the same month, or as soon thereafter as may be, after giving three months' notice, by advertisement, of the time, place and terms of sale, and should pay to the complainant, your petitioner, out of the proceeds of such sale, the aforesaid sum of \$39,877.13, in satisfaction of the debt accrued by the said mortgage. And your petitioner further sheweth that, although it appeared by the said decree that the total amount due thereby to your petitioner was the sum of \$65,256.52, yet the said district court thereafter, to wit, on the 7th day of March, 1854, in violation of the statutes of the United States, and of the right of your petitioner, allowed the said defendants to take an appeal from the said decree to this court, which should act as a *supersedeas*, upon their giving a bond in the penal sum of \$10,000 alone, conditioned that they prosecute their said appeal with effect, and answer all damages and costs if they fail to make their plea good; and when the said defendants had, on the day aforesaid, tendered such a bond with certain sureties thereon named, the said district court ordered, notwithstanding the objections interposed on the part of your petitioner, that the bond of appeal, so taken and filed, operates as a *supersedeas* to the decree of the said court hereinbefore set forth, all of which will fully appear by reference to the transcript of the record of the said cause, brought up to this court on the first appeal, and to the transcript of the subsequent proceedings in the said cause, filed in this court in support of a motion made on the part of your petitioner, at the present term, to dismiss the said second appeal, taken as aforesaid, by the said defendants.

And your petitioner further sheweth, that the action of the said district court, in ordering it to be entered that the appeal bond so taken operates as a *supersedeas* and stays the execution of the said decree, is contrary to law and oppressive to your petitioner; that unless this court interpose, a delay of one or two years must intervene before the decree can be car-

ried into effect; and, meanwhile, the security for the final payment of the amount decreed to be due and payable to your petitioner is wholly insufficient, and much less than the amount required by law, and that your petitioner has no remedy save in the present application to this court.

Wherefore your petitioner humbly prayeth that your honors would be pleased to order that a writ of *mandamus*, in due form, be at once issued from this court, returnable to the first Friday of the next term thereof, commanding and requiring the Honorable John C. Watrous, judge of the district court of the United States for the district of Texas, to cause the decree, so as aforesaid rendered by the said court, on the 25th day of February, 1854, to be at once carried into execution, according to the terms thereof, notwithstanding the appeal so taken by the said defendants, or, on failure thereof, to show to this court, on the said return day, why the same has not been done.

And in support of this petition your petitioner refers to the transcripts hereinbefore mentioned, and to the records of this court in relation to the said cause, and will ever pray, etc.

A. B.,

W. R.,

For the Union Bank of Louisiana.

#### ANSWER.

The United States of America, in the Supreme Court, December Term, 1854.

Between Josiah S. Stafford and Jeannette K., his wife, appellants, and the Union Bank of Louisiana, appellee.

The answer of John C. Watrous, judge of the district court of the district of Texas at Galveston, to the rule upon him to show cause why a peremptory *mandamus* should not issue, commanding him in said court to discharge the *supersedeas* to the enforcement of, and to order execution upon the decree rendered in said court, in favor of the said Union Bank of Louisiana, and against said Josiah S. Stafford and wife.

The respondent respectfully answers and certifies to the honorable the supreme court of the United States, that on the 6th day of March, 1854, in the district court of the United States for the district of Texas at Galveston, which was within ten days next after the rendition of the decree mentioned in the caption to this answer, the said Josiah S. Stafford and wife, feeling themselves aggrieved by the rendition of the same, in open court applied for and prayed an appeal to the next term thereafter of this court, to be held in the city of Washington on the first Monday in December thereafter, which to them was granted upon condition that they entered into good and sufficient bond, with good and sufficient security, in the sum of \$10,000, conditioned that they prosecute their appeal with effect, and answer all damages and costs if they should fail to make their plea good, and therefore, on the same day and year aforesaid, the



said Josiah S. Stafford and wife in open court tendered a bond, with L. C. Stanley, Patrick Kelly and William H. Clark as sureties, in the sum of \$10,000, and the court, having inspected the bond, and being satisfied that it was in conformity to law and the order of the court, and that the sureties were good and sufficient, "it was ordered that the bond be approved, and it was ordered to be entered that the bond of April, taken and filed in this cause, operates as a *supersedeas* to the decree of the court," and thereupon, and immediately after the order granting said appeal and the giving bond as aforesaid, and while the same remained in full force, unreversed and not set aside, this respondent respectfully submits that, neither in the said district court or in vacation, had he any longer jurisdiction over the cause between the parties aforesaid, or any power or authority to make any order in regard to the *supersedeas*, or to enforce the execution of the decree aforesaid, for the reason that thenceforward, by virtue of the appeal so taken and perfected as aforesaid, the said cause between the parties aforesaid had passed into and under the control of this court, and which was the proper forum only in which any such order could or can be rightly made.

This respondent further respectfully submits that, though upon investigation it should turn out that the bond given for the appeal as aforesaid was not taken in all respects in conformity to the requirements of the law, but might be irregular and depart from such requirements in regard to the amount of the penalty thereof or in other respects, yet this did not render the grant of the appeal merely void, or in any manner affect the *supersedeas* operated by law, but that the said appeal and the said *supersedeas* was, and continued to be, in full force and effect, and thus will remain until this court, in conformity to its practice, shall dismiss said appeal, and thereby discharge said *supersedeas* on account of a failure by the said Josiah S. Stafford and wife, when thereunto required, to give such bond as the law requires within such time as the court may prescribe.

This respondent further respectfully submits, that the bond taken and approved, and upon which the appeal before mentioned was granted, was taken and executed in full, complete and perfect conformity to law, and had he power and authority, either in term time or vacation, to make any order in regard to said *supersedeas* or the enforcement of the decree aforesaid by execution, and an application were made to him for such order, by reason of the said bond not being in the penalty or to the amount required by law, he would feel himself constrained to refuse any such order.

And these are the causes and reasons which this respondent has to offer why a *mandamus* should not issue to enforce a discharge of the *supersedeas* or an execution of the decree aforesaid.

But he respectfully submits to the judgment of the court, and will enforce by order any direction given by the court in the premises. The respondent respectfully refers to the brief of the counsel of the said

Josiah S. Stafford and wife, which will be filed in this honorable court, and the authorities therein referred to, in support and maintenance of the position assumed by this answer.

JOHN C. WATROUS.<sup>1</sup>

ALTERNATIVE WRIT OF MANDAMUS.

New Jersey, ss.—The State of New Jersey to James E. Goll, greeting:

Whereas, it has lately been represented to our justices of our supreme court of judicature, on the part and behalf of the Newark & New York Railroad Company, that you, the said James E. Goll, were by the incorporators of the said the Newark & New York Railroad Company, soon after the passage of the act entitled "An act to incorporate the Newark & New York Railroad Company," approved March 1, 1866, appointed secretary of said incorporators, and that you, the said James E. Goll, continued to act as such secretary until a board of directors of said company was duly elected by the stockholders thereof, and duly organized, to wit, on the first day of June last; and that you, the said James E. Goll, before and at the said time of the organization of the said board of directors of the said company, held in your hands certain books, records and papers belonging to the said company, consisting, amongst others, of the books of minutes of the proceedings of the said corporation and stockholders and directors, and the subscription book, containing the signatures of the subscribers to the capital stock of said company, and their subscriptions to said stock, and the receipt books of the said company; that you, the said James E. Goll, after the organization of said board of directors of said company, refused to deliver up the said books, records and papers to the said company, and that from that time to the present time you have kept the said books, records and papers, and have refused to deliver them up, and still keep them, and refused to deliver them to the said company, or their board of directors, although the same have been demanded of you by the said company; and that you, the said James E. Goll, also refuse to disclose or inform the said company where you have placed the said books, records and papers, and where you keep the same, although the said company have frequently, by their officers, requested you, the said James E. Goll, to inform them where the same are kept by you; whereupon, we being willing that due and speedy justice should be done in the premises, do command you, that immediately after receiving this our writ, you, the said James E. Goll, do deliver up to the said the Newark & New York Railroad Company, the said books, record and papers of the said company, or that you show cause in our supreme court of judicature, before our said justices thereof, on the fourth Tuesday of February next, why you have not done the same.

Witness, Mercer Beasley, Esq., our chief justice, at Trenton, the twenty-sixth day of November, in the year of our Lord one thousand eight hundred and sixty-six.

CHAS. P. SMITH, Clerk.

<sup>1</sup> The above petition and answer are found in *Stafford v. Union Bank of Louisiana*, 17 How. 275.

## RETURN.

To the Honorable the Justices of the Supreme Court of Judicature of the State of New Jersey :

James E. Goll, of the city of Newark, for return to the writ of alternative *mandamus* heretofore issued by this court against him on application made by "The Newark & New York Railroad Company," says :

That it is true that he was duly appointed secretary of said company, to wit, on the sixth day of March, one thousand eight hundred and sixty-six, and that he acted as such secretary from that time until the fifteenth day of May in the same year, but denies that he hath or ever held in his hands any books, records or papers belonging to said company, containing the minutes of the proceedings of the meetings of said corporators of said company, or of its stockholders or directors, or any book belonging to said company, containing the signatures of the subscribers to the capital stock of said company, and the receipt books of the said company. He admits that he has in his possession books, one in which he hath himself written the minutes of the proceedings of the meeting of the said corporators, and of the same stockholders and directors, and another in which are contained the signatures of the subscribers to the capital stock of said company, and their subscription to said stock, and the receipt books of said company ; but the respondent says that each of these books is his own property — was purchased by him with his own money, and that he has expended in said purchase the sum of one hundred and fifty dollars ; and further, the respondent says, that even if the said company had a right to said books, or any of them, which he denies, he hath a right to the custody and possession thereof, as security to himself for certain moneys due him from said company, to wit, for the cost of said books, one hundred and fifty dollars ; for this deponent's services as secretary the sum of seven hundred and fifty dollars ; for use and occupation of respondent's premises by said corporators, directors and stockholders, the sum of one hundred dollars. And the respondent insists that until he is paid what is due him as aforesaid, he cannot legally be required to deliver up said books.

And this respondent further says, that the said company had no right to a writ of *mandamus* in this matter, because there is a sufficient remedy against this respondent for any wrong he has done said company otherwise, either by writ of replevin, action in trover or bill of discovery in equity, to answer all or any of which respondent is fully capable pecuniarily.

And this respondent prays that such order may be made in the premises as is lawful and right, and that the respondent may be hence dismissed with his reasonable costs most wrongfully sustained.<sup>1</sup>

February 26, 1867.

JAMES E. GOLL.

<sup>1</sup>The above written alternative thereto are found in *State v. Goll*, writ of *mandamus* and answer 32 N. J. L. 285. The answer was

## PETITION.

Your petitioner, Rowland E. Evans, sufficiently shows to this court and states that on the 1st day of June, A. D. 1863, he was, and for a long time previously thereto had been, a member of the Philadelphia Club, which was incorporated by an act of assembly of this commonwealth, approved the 9th day of May, 1850, under the name of the Philadelphia Association and Reading Room, with authority to elect officers, to establish by-laws for their government, and that the name of the said corporation was subsequent to such incorporation changed to the Philadelphia Club; that he was many years ago duly made a member of the said corporation, and that he has always since his becoming a member as aforesaid, until the time of the grievance hereinafter complained of, enjoyed the benefits and exercised the privileges of such membership, and has committed no act by reason of which he could justly be deprived of his said membership.

That the said corporation owns certain real estate, consisting of a lot of ground in the city of Philadelphia, in the state of Pennsylvania, whereon is a building used as a club-house by the said corporation.

That on or about the 9th day of May, 1863, he received a private notice stating that a special meeting of the said corporation would be held on the 1st day of June then next, to take into consideration the circumstances of an alleged violation by Rowland E. Evans of his duty as a corporator, by being guilty of disorderly conduct within the walls of the club, in offering a blow to Samuel B. Thomas, one of its members, on the evening of the 24th of February, 1863, and the propriety of expelling the said Rowland E. Evans from his membership of the club, he having been heretofore, to wit, on the 7th of March, 1863, requested by the board of directors to resign from the club by reason of such conduct, and having thereupon refused so to do. By order of the board of directors, and signed M. Edward Rogers, secretary.

That at a meeting so held on the 1st day of June, 1863, certain proceedings were had by which a certain number of the persons then and there present undertook to pass and passed a resolution to expel him from his membership of the said club, and to deprive him of his rights as a member and corporator thereof, and that he was subsequently notified by the said corporation, by some one professing to act in its behalf, of his said expulsion or attempted expulsion and deprivation of membership in said corporation.

That by reason of the premises his said attempted expulsion and deprivation was unjust, illegal and contrary to the rules and laws by which corporations are governed and controlled, and that he has been greatly

adjudged insufficient, since by their turn was granted and a peremptory use the books had become the prop- writ was issued.  
erty of the corporation, and the re-

wronged and injured in being deprived of his rights of membership of the said corporation as aforesaid.

Wherefore your petitioner prays for a writ of *mandamus* to be directed to the said The Philadelphia Club, commanding it forthwith to restore him to the exercise of his rights of a member and corporator of the said corporation, or to show cause, if any it has, why he should not be restored to his rights as aforesaid.

#### RETURN.

Now comes the respondent, The Philadelphia Club, and files this its return to the petition of the relator herein.

The respondent admits that it was incorporated, and that it has since changed its name as stated in the petition of the relator.

The respondent further alleges that it had established certain by-laws for its internal discipline and for regulating the intercourse of its members, which said by-laws were in force at the times hereinafter mentioned.

That said by-laws provided that the affairs of the said corporation should be managed by a board of directors consisting of the president and six directors, who should be elected at the stated meeting in April in every year, who should have and exercise a general superintendence of the affairs of the corporation, control and manage its property and effects and enforce the preservation of order and obedience to the rules.

That the said by-laws provided that if the conduct of a member should be disorderly or injurious to the interest of the club or contrary to its by-laws, the board should inform him thereof in writing, and, if the nature of the offense require it, should request him to resign; and that should such information or request be disregarded, the board should refer the matter to the next stated meeting of the club, or to a special meeting to be called for the purpose, of which due notice should be given to the offending member; at which meeting the circumstances of the case should be considered and the member might be expelled.

That the sixty-eighth by-law provided that the board of directors, by a unanimous vote by ballot of all its members, might expel a member of the club for an infraction of either of the by-laws numbered 28, 58 and 73, or for intentional violation of the by-laws relating to the ballot, or for other gross misconduct, immediate notice of which expulsion should be given him. Such expulsion should be final unless reversed by a special meeting of the club, which, at the written request of the member so expelled, made within thirty days thereafter, should be called by the board. A copy of the notice of the said meeting should be sent to the offender, who should have the right to be present and to be heard thereat.

That the thirty-ninth by-law provided that all interest in the property of the club, of members resigning, or otherwise ceasing to be members, should be vested in the club.

That the by-laws regulating meetings of the club were and are, so far as respects the present case, as follows:

The fourteenth provided that notice of any meeting of the club, whether stated or special, should be posted upon the notice board at least ten days before the time assigned for such meeting.

The fifteenth provided that it should be the duty of the board to call a special meeting of the club upon the written request of ten members, and such a meeting might also be called whenever the board might deem it expedient.

The sixteenth provided that the notice of a special meeting should specify the time and also the purpose for which it might be called, and such meeting should not consider or take action in any matter otherwise than that specified in said notice.

The next provided that at any meeting of the club for action in the conduct of a member which might involve his expulsion, or for an alteration of the by-laws, one-fourth of the whole number of the members of the club should be a quorum.

And the twentieth provided that a motion involving the expulsion of a member should be decided by ballot, and the decision of a majority should be final.

The respondent annexes to this return a copy of all its by-laws, and prays that they may be taken as a part of this return.

The respondent alleges that it owns no other real estate than its club-house.

The respondent further alleges that the relator became a member of the said club in 1848, and thereby bound himself to the observance of such by-laws as the corporation had established or might from time to time establish for its government.

That on the evening of the 24th of February, 1863, the relator was guilty of breaking the said by-laws by having an altercation within the walls of the said club-house, in a room in said club-house, wherein the said corporation was then in session, with Samuel B. Thomas, another of the members of said corporation, and by striking him a blow then and there.

That an investigation of the said conduct of the relator by the board of direction of the corporation was had after due notice to the relator, and after hearing and considering all the circumstances of the case, as detailed in writing by the relator, by the said Samuel B. Thomas and by other witnesses of the transaction, the said board requested the relator to resign his membership of the club, which the relator refused to do.

That the board of direction then called a special meeting of the said corporation to be held on the 1st day of June, 1863, and that the notice of said proposed meeting was posted upon the notice-board of said club-house for more than the ten days last prior to the said 1st day of June; that the relator was notified in writing on the 19th day of May, 1863,

of the said proposed meeting to be held on the said 1st day of June; that the said notice so posted on the said notice-board, and the said written notice given to the respondent, both specified that the said special meeting to be held on the said 1st day of June would take into consideration the circumstances of an alleged violation by Rowland E. Evans of his duty as a corporator, by being guilty of disorderly conduct within the walls of said club, and in the presence of a meeting of the said club, in offering a blow to Samuel B. Thomas, one of its members, on the evening of the 24th of February, 1863, and the propriety of expelling the said Rowland E. Evans from his membership of the club, he having been heretofore, to wit, on the 7th day of March, 1863, requested by the board of direction to resign from the club, by reason of such conduct, and having thereupon refused so to do.

That at the meeting of the said corporation held on the 1st day of June, 1863, in accordance with said notice, over one hundred members thereof were present, the said corporation then having only two hundred and fifty members, and after an examination of the testimony offered and the hearing of witnesses on the subject which the meeting was called to consider, a motion to expel the said relator from his membership of the said corporation was made, and upon a ballot being taken thereon, sixty-eight votes were cast in favor of the motion and thirty-two votes were cast against the motion, and the said relator was thereupon declared by the presiding officer of said meeting to be expelled from his said membership.

Wherefore, having fully answered, the respondent prays to be hence dismissed with its costs and charges.

#### REPLY.

For reply to the respondent's return herein the relator denies that on the evening of the 24th of February, A. D. 1863, he had an altercation with one Samuel B. Thomas, or that he struck the said Thomas in a room in the said club-house, in which the said corporation was in session.

The relator further denies that at the meeting of the said corporation which was held on the 1st day of June, 1863, as alleged in the respondent's return, any evidence or testimony was introduced or presented at the said meeting.<sup>1</sup>

<sup>1</sup> The substance of the foregoing petition and answer may be found in *Evans v. Philadelphia Club*, 50 Pa. St. 107. The allegations have been altered to suit the objections urged by the litigants and by the court. The case is introduced because of the particularity required in such cases, which are frequently presented to the courts. For further illustrations of the pleadings in *mandamus* proceedings reference may be had to: *Doolittle v. County Court*, 28 W. Va. 158; *Com. v. Pittsburgh*, 34 Pa. St. 496; *Secombe, Ex parte*, 19 How. 9;

People v. Walker, 9 Mich. 328; 69 Ind. 218; State v. Cincinnati King v. Goodrich, 3 Smith, 388; (City), 19 Ohio, 178; State v. Zanesville, etc. Co., 16 Ohio St. 308; Drew v. McLin, 16 Fla. 17; State v. Lawrence, 3 Kans. 95; Babcock State v. Aldermen (Act. Bd.), 1 v. Goodrich, 47 Cal. 488; State v. Rich. (N. S.) 30; Hawkins v. More, Lafayette Co. (Court), 41 Mo. 545; 3 Ark. 345; People v. Pearson, 2 State v. Grand Island, etc. R. R. 27 Scam. 189; Taylor, Ex parte, 14 Neb. 694; Lafayette (City) v. State, How. 3.





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- Has been granted when appeal not sufficiently efficacious, §§ 53, 201.
- Inconvenient delay attending appeal, no ground for a mandamus, § 201.
- Mandamus lies to certify an appeal to the appellate court, § 80.
- When appeal suspends judgment, mandamus not granted to put one into office in accordance with the judgment, § 144.
- When appeal does not suspend judgment the appellant cannot have a mandamus to put him into office, though he has the certificate when the judgment was for the respondent, § 144.
- Mandamus not lie to compel allowance of appeal from interlocutory order of court, § 196.
- Mandamus lies to fix the *supersedeas* bond on an appeal, § 189.
- Mandamus lies to set aside wrongful dismissal of appeal from a non-suit, § 201.
- Cannot review judgment by a mandamus, when no appeal allowed, § 202.
- because of failure to appeal in time, § 201.

**APPEAL (continued):**

Mandamus lies to grant an appeal, when party entitled to it, § 208.

If mandamus issued to grant appeal, it will require performance of all acts necessary to make appeal efficacious, § 208.

In such cases, if necessary, the court will be ordered —

to make a *nunc pro tunc* order, § 208.

to record the allowance of the appeal, § 208.

to allow appeal from probate of codicil of a will, § 208.

to make out and deliver the transcript, § 208.

to examine appeal bond and grant a *supersedeas*, if sufficient, § 208.

Mandamus lies to compel court to entertain an appeal, if it improperly refuses, § 203.

If appeal improperly dismissed, does mandamus or appeal lie, § 205.

mandamus does not lie, if such dismissal is considered a final judgment, §§ 205, 206.

a mandamus lies, unless another remedy or the decision is by law intended to be final, § 205.

Mandamus lies to an officer to obey decision of his superior officer, to whom an appeal was taken from his decision, § 31.

**APPEAL IN MANDAMUS PROCEEDINGS:**

Prior to statute of 9 Anne no appeal allowed, § 304.

Now allowed in England if return is traversed, or there is a verdict or a judgment on a demurrer, § 304.

In America always allowed, if action of court considered a final judgment, § 305.

There must first be a final judgment, § 305.

Appeal has been allowed —

when peremptory writ allowed on the pleadings, § 305.

when peremptory writ issued, the respondent declining to plead after demurrer to petition overruled, § 305.

when proceedings dismissed on hearing of application or of order to show cause, §§ 305, 306.

There must be a court with appellate jurisdiction of cause, § 308.

See **SUPERSEDEAS**.

**APPLICATION: See DEMAND.****APPROPRIATIONS:**

Mandamus not lie to state officers to pay out money in the absence of an appropriation, §§ 89, 104, 105.

Mandamus not lie to state officers to pay out money which the state has otherwise appropriated, § 89.

When law fixes salary and directs its payment, no annual appropriation necessary, § 104.

**APPROVAL:**

Mandamus not lie to do an act, when no duty to do it, unless another party approves, § 58.

**ARBITRATION:**

Arbitrators not required by mandamus to proceed to arbitrate, § 16.  
compelled to select an umpire, §§ 24, 35.

A witness compelled to make affidavit to a submission to arbitration, § 24.

See **PRIVATE PARTIES**.

**ARREST:**

Mandamus lies to court to cause release of party improperly arrested on civil process, § 189.

Mandamus not lie to release party committed to jail, or required to give bond, on a charge of crime, § 209.

Mandamus not lie to release one alleged to be improperly detained under order of court, § 209.

**ASSESSORS OF TAXES:**

Required to do their duty, § 127.

to assess all property subject to taxation, § 127.

to assess taxes as increased by board of equalization, § 127.

to enter in assessment book prior delinquent taxes, § 127.

to charge assessment to proper party, § 127.

to assess a school tax, as determined by proper authorities, § 127.

to include in taxes claims allowed against county, § 127.

not to assess increased taxes imposed by illegal board of equalization, § 127.

to assess to return taxes wrongfully assessed and paid, § 127.

Not required to assess taxes, if in excess of the law, § 127.

Mandamus not lie to them, when no longer have control of the assessment, §§ 75, 127, 241.

Not required to make the legal oath to the assessment rolls, when they return they cannot truthfully do it, § 60.

Must accept governor's interpretation of the law, when not judicially determined, unless plainly wrong, § 127.

Not subject to mandamus in acts calling for discretion and judgment, § 127.

**ASSIGNEE:**

Assignee of part of a debt cannot compel public officers to issue a warrant to him, § 111.

**ASSOCIATIONS: See SOCIETIES.****ATTACHMENT:**

Lies for disobedience of writ of mandamus, §§ 2, 298.

May issue to compel a return to the alternative writ, § 266.

May issue when no return made to peremptory writ of mandamus, § 298.

If clear no intentional contempt, an *alias* peremptory writ may issue, § 297.

**ATTACHMENT (continued):**

Is sought by motion, supported by affidavits, § 298.

Court grants an order to show cause why an attachment should not issue, § 297.

If the return to the alternative writ is made to avoid the justice of the court, a rule may issue to show cause why an attachment should not issue for contempt of court, § 284.

On attachment for contempt, may impeach validity of the alternative writ, § 269.

Mandamus allowed in Alabama to review action of court relative to quashing an ancillary attachment, § 199.

If a corporation disobeys, the writ issues against the individuals who disobey the writ of mandamus, § 303.

Officers of board or corporation who are in office when the writ issues must obey, and they are liable to proceedings for contempt, § 303.

Only one attachment should issue against all the officers, § 303.

If a board disobeys the writ, and several members are willing to obey it, a disputed question whether all should be attached, § 303.

In Alabama a mandamus may be granted to review the action of the court in granting or setting aside an attachment for a witness, § 199.

In Michigan a mandamus was granted to vacate an order quashing the attachments of defendants in a suit, § 200.

See CONTEMPT OF COURT; ORDER TO SHOW CAUSE WHY ATTACHMENT NOT ISSUE.

**ATTORNEYS:**

Mandamus lies to restore disbarred attorneys, § 195.  
unless the court had a discretion, § 195.

Attorneys disbarred may be so restored —

if the court went outside of its discretion, § 195.

if the proceedings were irregular or against law, § 195.

if the court was without jurisdiction, § 195.

if there was flagrant injustice, § 195.

if the court's action was erroneous or a mistake, § 195.

if the judgment is too severe, § 195.

Mandamus lies to admit one to be an attorney, when the right is given by law, § 195.

A return by its attorney is not the return of a county court, § 282.

A mandamus will not lie to county officers to pay an attorney employed by them without authority of law, § 111.

**ATTORNEY-GENERAL:**

Represents the government in mandamus proceedings, § 229.

Cannot be required to file a *quo warranto* when he is allowed a discretion about filing, § 33.



## AUDITOR:

Can be required by a mandamus —

- to audit a claim properly allowed, § 126.
- to issue his warrant for a properly allowed claim, § 126.
- to place proper assessments on a tax duplicate, § 31.
- to pass on a claim, when discretion therein is given to him, § 126.
- to pass on each item of an account, § 126.
- to draw a warrant, though the funds have been improperly applied, § 126.
- to correct his books, if the funds are improperly credited, § 126.
- to audit an officer's salary account, § 136.
- to issue a warrant, if a prior one did not reach the creditor, § 126.
- to perform any other ministerial duty, § 126.

Cannot be required by mandamus —

- to issue his warrant for claim not properly allowed, § 126.
- not legal, § 126.
- where allowance has been reversed, § 126.
- to allow a claim as of a certain amount, when discretion given him, § 126.
- to audit a claim till it has been properly allowed, § 126.
- to audit a claim, unless such is his duty by law, § 126.
- to audit a salary fixed and adjudicated by law, § 135.

He cannot review an allowance already legally made, § 126.

Auditor of a city cannot refuse to draw his warrant, when the legislature authorizes the city, and the city wishes, to pay the account, although originally contracted *ultra vires*, § 126.

Can an auditor be required to draw his warrant, when there are no funds on hand? Controverted, § 126.

## AUDITOR OF STATE:

Has been required by a mandamus —

- to issue his warrant for an officer's salary, § 105.
- to transfer and fund state bonds, § 105.
- to publish statements of insurance companies, § 105.
- to advertise for public printing, § 105.
- to issue notes to a bank, § 105.
- to issue his warrant for a claim legally allowed, § 105.

If doubtful about a claim, he may wait for a mandamus, § 105.

Cannot alter amount of a claim settled by his predecessor, § 105.

Must recognize the *de facto* officer, holding the commission, § 105.

His discretion only reviewed in a case of clear and wilful disregard of duty, § 105.

Must recognize as member of legislature the party holding the proper certificate, if no contest pending in legislature, § 107.

Cannot be required to draw his warrant if no appropriation, § 105.

controverted, § 105.

**AUDITOR OF STATE (continued):**

Cannot be required to draw warrant, if appropriation exhausted.  
§ 105.

See **EXECUTIVE OFFICERS; SALARIES; WARRANTS.**

**AWARDS:**

To enter as judgment of court, mandamus issued, § 189.

**B.**

**BAIL:**

Mandamus refused to decide amount, § 187.

**BAILEE:**

Mandamus will not go against a private bailee, § 23.

**BANKRUPT:**

Mandamus issues to his commissioners to issue warrant for his examination, § 204.

**BIDS FOR PUBLIC CONTRACTS:**

Mandamus issued to let contract to lowest bidder, § 117.

for county buildings, § 117.

for state printing, § 117.

for supplies for county, § 117.

Mandamus refused, when law to let to lowest bidder is directory,  
§ 117.

because bidder has no clear legal right to it, § 56.

when public interests required new advertisement, § 66.

when officer allowed a discretion, § 117.

because law gave discretion —

when bid deemed excessive, § 117.

when bidder required to be responsible, § 117.

when bidder required to give adequate security, § 117.

when right reserved to reject all bids, § 117.

when contract required special skill, § 117.

when bid not lowest according to amount required, § 117.

See **CONTRACTS.**

**BILL OF EXCEPTIONS:**

Mandamus lies to judge to sign, § 190.

Not lie to one who acted as judge only by consent of parties, §§ 23,  
193.

Not lie to judge, if predecessor tried case, § 194.

if he has resigned or term has expired, §§ 193, 241.

Exceptional cases, §§ 78, 193, n.

The bill should accompany the petition, §§ 190, 261.

Decision of judge final as to correctness of bill, § 190.

Judge cannot be required to sign a particular bill, § 32.

Writ will not direct judge how to frame it, § 190.

**BILL OF EXCEPTIONS (continued):**

Writ refused if judge returns that he has already signed a bill, § 190.  
 Affidavits ordered stricken from files may by mandamus be inserted in the bill, § 190.

Bill should in good faith profess to contain all the evidence, § 190.

Proper course to pursue in preparing bill, § 190.

Writ granted if judge admits bill to be correct or has acted on it as correct, § 190.

Bill must be presented in time allowed by law unless the time extended by order entered of record, § 192.

When not signed in time by judge's fault, mandamus lies to sign, §§ 50, 80, 192.  
 opposing party's fault, 192.

When judge can decide whether delay excusable, mandamus not lie, § 192.

Writ refused if bill incorrect, illegible, disorderly, erased or interlined, § 190.

if prisoner has escaped after conviction, §§ 68, 194.

if law provides another remedy, §§ 53, 194.

to erase alterations made by judge after signature, §§ 23, 194.

Application to obtain under statute of Westminster, § 191.

**BOARDS:**

Mandamus lies against, by a member thereof, § 231.

to accept as a member one elected as such, § 142.

Mandamus refused to compel acceptance as a member of one elected as such if it has already recognized another party as such, § 143.

Return should in form be the return of the board, § 282.

Individual members cannot put in their own returns, § 282.

A majority can make a return in the name of the board, § 282.

If it cannot agree on a return court will compel an agreement, § 282.

Of two returns court will decide which is the true one, § 282.

**BONDS (MUNICIPAL):**

Mandamus lies to deliver public bonds to officers entitled to their custody, § 135.

Mandamus lies to pay interest thereon out of a certain fund according to statute, § 135.

Mandamus issued to deliver county bonds to a railroad, § 111.

to deliver county bonds to a contractor, § 111.

to president of a village to sign its bonds, § 111.

Not required to issue in accordance with vote, when notice of election irregular, § 111.

six years after were demandable on account of laches, § 87.

to sell, when option allowed about selling, § 110.

See TAXES (LEVY OF).

**BONDS (OFFICIAL):**

Whether approval of, is judicial or ministerial, depends much on local law, § 118.

If approval of is a judicial act, mandamus refused; if ministerial granted, §§ 31, 32, 118, 153.

Writ will not issue to accept bond when filed after time allowed, § 123.

Refused to compel acceptance after office declared to be vacant, § 187.

When pleading an official bond, averments are necessary showing that it complies with the law, § 256.

See **APPEAL**; **PRIMA FACIE TITLE**; **SUPERSEDEAS**.

**BOOKS (PUBLIC):**

Mandamus lies to compel their production, § 14.

To obtain inspection, relator must show in petition an interest in such documents, and his good faith, § 14.

Not necessary to make any showing when law allows inspection as a right, § 14.

Not necessary to make any showing when intent of law to allow inspection to prevent fraud, § 14.

Mandamus lies to obtain possession of by party entitled to, §§ 154, 155.

Officer having the commission may obtain possession of by this writ, §§ 23, 142.

Mandamus lies to late incumbent to obtain books of his office, § 78.

Writ not lie to obtain public books from a private party, § 156.

Respondent must be an officer, the late incumbent or executor or widow of an officer or of the late incumbent, or one claiming to act as such officer, §§ 24, 156.

The writ lies to compel the production of public books at corporate meetings, §§ 109, 155.

This writ lies to compel their submission to legal inspectors, § 155.  
the making of entries therein in the manner the law requires, § 109,

their deposit as required by law, § 155.

Books containing the public accounts become public books, though other entries are made therein, § 155.

See **BUILDINGS (PUBLIC)**; **INSIGNIA**; **JAIL**; **PARAPHERNALIA**; **PRIMA FACIE TITLE**.

**BOOKS (PRIVATE CORPORATION):**

Director can inspect as a matter of right, § 161.

Corporator can obtain an inspection by mandamus, § 161.

Not granted to a corporator for curiosity, speculative purposes, etc., § 161.

Corporator must show good motive and object, unless the law allows him an inspection as a matter of right, § 161.

**BOOKS (PRIVATE CORPORATION) (continued):**

A creditor may by mandamus obtain an inspection when the law gives him the right, § 161.

An officer will by this writ be compelled to deliver such books to his successor, § 165.

Books used by officer to make corporate entries become corporate books, §§ 161, 165.

No matter how such books are kept they are subject to inspection, § 161.

The custodian of the books is the proper respondent, § 334.

Directors may be joined as respondents if custodian acts under their orders, § 334.

By statute a mandamus allowed to obtain the books of the local superintendent for a foreign corporation, § 22.

**BOUNTIES:** See **VOLUNTEERS**.

**BRIDGES (PUBLIC):**

Mandamus lies to county officers to appropriate money to build a bridge, § 111.

to build a bridge as required by statute, § 111.

to repair bridges kept open for public travel, § 116.

Duty to keep a bridge in repair includes rebuilding when necessary, § 116.

When discretionary whether or not to build or rebuild a bridge, mandamus not lie, §§ 33, 116.

Mandamus will lie to repair a bridge, but will not indicate the mode or time of repairing when discretion allowed therein, § 116.

A private corporation cannot be compelled by mandamus to fulfill its contract to keep a bridge in repair, § 16.

**BUILDINGS (PUBLIC):**

Mandamus lies to obtain possession by officer entitled to custody, §§ 142, 154, 155.

Writ lies to levy a tax to pay for their construction, § 129.

See **PRIMA FACIE TITLE**.

**C.**

**CANVASSING BOARD:** See **ELECTIONS (CANVASSERS OF)**.

**CASUS OMISSUS:**

Mandamus will not lie to enforce, § 60.

**CERTIFICATE OF ELECTION:**

Mandamus lies to issue, although already given to another, § 182.

when decision for relator has been sustained on appeal by equally divided court, § 181.

Mandamus refused, when not disputed that relator ineligible, 180.

See **COMMISSION; ELECTIONS (CANVASSERS OF)**.

CHANCERY: See EQUITY.

CLERK OF COUNTY BOARD: See COUNTY BOARD (CLERK OF).

COLLECTORS OF REVENUE:

Mandamus lies to, to discharge their duties, § 133.

to make tax deeds, § 133.

to pay school taxes to proper officers, § 134.

to pay taxes collected for railroad bonds to the proper officers,  
§ 134.

Such duties must be officially imposed on them, § 133.

COMMISSION:

One holding the commission has *prima facie* right to the office, § 142.

can by mandamus obtain admission to office, § 142.

Rights of one holding commission can only be questioned in *quo warranto* or contest for office, § 142.

Cannot obtain by mandamus admission to office, pending an appeal on contest for office, decided against him, if appeal does not suspend the judgment, § 144.

See BOARDS; CERTIFICATE OF ELECTION; PRIMA FACIE TITLE.

COMMISSIONER OF PATENTS: See PATENTS (COMMISSIONER OF).

COMMISSIONER OF PENSIONS: See PENSIONS (COMMISSIONER OF).

COMMISSIONER OF STATE LAND OFFICE: See STATE LAND OFFICE (COMMISSIONER OF).

COMMON CARRIERS:

Mandamus lies to, to treat all alike, §§ 25, 162.

See IRRIGATION; RAILROADS; TELEPHONES; PUBLIC USE.

COMMON LAW:

Generally adopted in America, §§ 6, 285.

A sufficient common-law remedy bars a mandamus, § 51.

COMPTROLLER OF STATE:

Mandamus lies to enforce duties specifically imposed on him, § 104.

Mandamus not lie when discretion and judgment allowed him, § 104.

Mandamus issued to audit account of legislator, § 104.

to issue his warrant, § 104.

to allow inspection of his records, § 104.

If in doubt as to party or his duty, may await a mandamus, § 104.

See APPROPRIATIONS; EXECUTIVE OFFICERS; SALARIES; WARRANTS.

CONCILIUM:

Under early practice took the place of a demurrer, § 268.

If alternative writ good on concilium, peremptory writ issued, § 268.

If return good on concilium, judgment for respondent, § 268.

If return bad on concilium, peremptory writ issued, 268.

Concilium ordinarily preferred to motion to quash, § 268.

See DEMURRER.

## CONGRESSMAN:

Mandamus lies to canvass returns of election for congressman, as provided by state law, § 183.

## CONSTITUTIONAL LAW:

Will constitutionality of law be passed on in mandamus proceeding? Disputed question, § 65.

Ministerial officer cannot in mandamus proceedings raise the question of constitutionality of a law, § 65.

The extent of the application of a mandamus relative to an existing debt may be increased, § 20.

Law cannot take away right to compel by a mandamus levy of tax to pay a debt already contracted if there is no other adequate specific remedy, § 20.

## CONTEMPT OF COURT:

Mandamus not lie to compel court to punish for, § 187.

not lie to compel court to rehear proceedings for contempt after a discharge on the hearing, § 187.

granted in Michigan to vacate an order punishing for contempt of court, § 200.

Officers of a corporation individually liable for disobedience of a mandamus by the corporation, § 237.

If all of a board are attached for disobedience, court will not punish those willing to obey, § 303.

Successor in office of the respondent must be notified of proceedings before he can be punished for contempt, § 238.

Parties must have actual notice of proceedings before adjudged guilty of contempt, § 303.

Party to suit presumed to have notice of all the proceedings, § 303.

If court had jurisdiction, contempt to disobey though decision erroneous, § 302.

If no jurisdiction, no contempt, and party, if committed, may be released on *habeas corpus*, § 302.

Punishment is usually a fine and committal to prison till fine paid and order obeyed, § 302.

Court may include as costs a fair compensation to relator's attorneys for services in the contempt proceedings, § 302.

If on attachment respondent returns obedience to writ, relator may traverse such return, § 302.

## CONTINUANCE:

Mandamus issued to court to proceed with a cause which it continued without a proper showing, 204.

## CONTRACTS (PRIVATE):

Mandamus will not lie to enforce, § 16.

Statute may however so provide, § 16.

## CONTRACTS (PRIVATE) (continued):

Mandamus will lie to enforce when it is a public trust or official duty, § 16.

Form of contract cannot confer a right to this writ, §§ 16, 174, 210.

Object sought immaterial as to right to this writ, § 16.

## CONTRACTS (PUBLIC):

Mandamus not lie to let a public contract, when officer allowed discretion about letting or as to certain requirements, §§ 110, 116.

Mandamus refused to let contract to bidder, § 16.

to let contract to bidder, when work changed, § 117.

to let contract to bidder because bidder has no absolute right to it, §§ 117, 229.

See Bids.

## CORPORATIONS:

Writ of mandamus against a corporation should run against the corporation by name, or the officer or select body thereof whose duty it is to do the act desired, or against both jointly, § 237.

If the writ runs to the select body, it should give the titles of such officers, with or without their individual names, § 237.

Objections as to mode of specifying the respondents must be taken *in limine*, § 237.

In such cases no change of members will affect the proceedings, § 240.

The officers who disobey the writ can alone be punished for contempt, § 237.

In such cases doctrine of discontinuance does not apply as to officers not served, § 237.

Those in office when writ issues must obey it, § 240.

When corporation abolished, only remedy is by application to the legislature, § 240.

When alternative writ is directed to a corporation or a board, the return should be in form its return, § 282.

Return by individual members personally is not proper, § 282.

See CONTEMPT OF COURT.

## CORPORATIONS (BENEVOLENT):

Mandamus lies to levy assessment to pay death losses, § 174.

When liability is denied, suit must first be brought, § 174.

When agreement is to pay amount of assessment, suit must first be brought to determine amount of assessment, § 174.

When agreement to pay a certain sum on death, the remedy is by suit, § 174.

Mandamus not lie to levy assessments in excess of the allowance of laws of the corporation, § 174.

See ECCLESIASTICAL TRIBUNALS; VISITOR.



## CORPORATIONS (FOREIGN):

Questionable whether a mandamus runs against, § 177.

Under statute a mandamus has issued against its agent, § 177.

## CORPORATIONS (PRIVATE):

Mandamus against formerly refused in England, § 22.

Now mandamus runs against all corporations, §§ 28, 157, 158.

Can have a mandamus to obtain its books, § 24.

Mandamus issued against—

to pay taxes assessed on its capital stock, § 159.

to submit their affairs to an examination, § 159.

to furnish names of stockholders to tax assessors, § 159.

to allow owner of a lot in a cemetery to bury a colored person therein, § 159.

Mandamus will not lie where there is another remedy, § 163.

Mandamus not lie to pay a dividend it has declared, § 163.

Cannot be required to file a tax statement, when upon default it is duty of county auditor to make it, § 53.

Will not be compelled to show its list of stockholders, when not sought for a proper purpose, § 68.

Will not be required by mandamus to make a transfer of its stock on its books, § 160.

such transfer has been compelled by some courts, §§ 54, 160.

under special statutes such transfer compelled, § 160.

equitable transferee cannot compel such transfer on the books, § 56.

When unable to discharge its duties, *quo warranto* is the proper remedy, § 176.

See CORPORATORS (PRIVATE CORPORATIONS); BOOKS (PRIVATE CORPORATIONS); ECCLESIASTICAL TRIBUNALS; OFFICERS (PRIVATE CORPORATIONS); PUBLIC USE; VISITOR.

## CORPORATIONS (PUBLIC):

May have a mandamus to obtain its books, § 24.

May by mandamus compel officers to produce their books at their meetings, § 109.

May be by mandamus compelled to perform any ministerial act, § 108.

Mandamus lies to enforce a judgment against, § 130.

Cannot in mandamus to pay, or to levy a tax to pay a debt due the state, set up a debt due it from the state, § 89.

Mandamus not lie to pay damages accruing, while hesitating whether to abandon condemnation proceedings, § 135.

Power to disfranchise a corporator must be expressly authorized by law or by prescription, unless he has been convicted of a felony, § 137.

**CORPORATIONS (PUBLIC) (continued):**

If a corporator has been wrongfully disfranchised, he may be restored by this writ, § 137.

Party having proper qualifications may have a mandamus to admit him as a member, if the duty is imperative on the officers, § 137.

Mandamus will lie to count the votes cast at an election, § 139.

The mayor with the consent of the majority of the burgesses should make return to an alternative writ for a municipality, § 282.

Writ refused to give bonus to a railroad, when bribery used to control the vote therefor, § 68.

See BOOKS (PUBLIC); SUBSCRIPTIONS; VISITOR.

**CORPORATORS (PRIVATE CORPORATION):**

May be restored by mandamus, when wrongfully expelled, §§ 166, 167.

Not necessary that pecuniary interest should be involved, §§ 49, 167.

Before expulsion a corporator must have —

notice of the charges, § 168.

a full opportunity to be heard, § 168.

opportunity to be present at the taking of testimony, § 168.

opportunity to examine the witnesses, § 168.

Expulsion must be by body of corporators, unless charter otherwise provides, § 168.

The charges must be covered by the law as to the offenses, § 168.

Mode of expulsion must conform to the rules, § 168.

Legal grounds for disfranchising a corporator, § 166.

Joint-stock company must have express power to disfranchise, § 166.

Corporator cannot be disfranchised —

for villifying another member, § 166.

for not submitting business controversies to arbitration, § 166.

for not paying unnecessarily increased dues, § 166.

for not acting on committees, § 166.

for not obeying improper by-laws, § 166.

from private revenge, § 166.

from religious intolerance, § 166.

from political proscription, § 166.

Disfranchisement must be ordered in good faith, § 166.

Court will construe by-laws, and sustain them, if practicable, § 166.

Record of expulsion should show all the proceedings, § 170.

Must be some one to pass on the facts, § 168.

exception in mutual assessment insurance associations, § 168.

Copies of charter and by-laws usually filed with the petition or with the return, § 261.

Mere irregularities, leading up to expulsion, not vitiate the proceedings, § 170.

Expelled member must first appeal to corporate tribunals, § 169.

unless no jurisdiction to expel on charges preferred, § 169.

## CORPORATORS (PRIVATE CORPORATION) (continued):

Mandamus will not issue, if liable to be regularly expelled on those charges, § 170.

Mandamus will lie to admit as a member one having the necessary qualifications and entitled by law to be admitted, § 172.

Writ will not issue to admit as a member one who may be regularly expelled for offenses then existing, § 170.

Great certainty required in return to alternative writ to restore an expelled member, § 275.

Return must state all the facts necessary to show that the removal was legal, in proper manner, and for good cause, § 275.

If the expulsion was not at a regular meeting, the return must show that notice, general or special, was given to all members, § 275.

If the expulsion was regularly conducted, the court will not re-examine the merits, §§ 166, 275.

See WAIVER.

## COSTS:

Are awarded in the discretion of the court, § 310.

Are generally awarded to the successful party, § 310.

Mandamus will not lie to make a court alter its decision as to costs in a suit, § 187.

Mandamus will not lie to a court to set aside a dismissal for failure to pay costs, § 201.

## COUNCIL (CITY):

Mandamus will run to the council of a city —

to open a street already laid out, § 113.

to act upon nominations submitted by the mayor, § 113.

to approve a plat of land laid out in the city, § 113.

to fix the amount of official bonds, § 113.

to meet in joint session to appoint certain officers, § 113.

to canvass an election and pass an ordinance therefor, if necessary, § 139.

to pass an ordinance to create a fund to erect a market, § 113.

to agree on an ordinance for levying a certain tax, § 35.

A mandamus will not be granted to compel aldermen to attend the meetings of the council, §§ 69, 113.

Will not be required by mandamus to elect officers, when the terms thereof have expired before the hearing, § 77.

The writ will not issue, when a discretion allowed about doing the act, § 110.

See TAX (LEVY OF).

## COUNTY OFFICERS (MANAGING BOARD):

Mandamus lies to them to discharge duties imposed by law, § 111.

only to perform acts authorized by law, § 111.

**COUNTY OFFICERS (MANAGING BOARD) (continued):**

They have been required by the writ of mandamus —

to accept the lowest bid for a contract, § 111.

to approve an official bond, § 111.

to correct an erroneous assessment and refund the money paid, § 111.

to refund money paid as a fine after reversal of the judgment, § 111.

to admit a deed to record, § 111.

to divide a township, § 111.

to pass on claims against the county, §§ 32, 36.

to audit accounts against the county and issue warrants, § 111.

to reconvene and declare a resolution carried which was declared to be defeated, § 111.

to determine the sheriff's fees for collecting taxes, § 111.

to fix rate of charges for water for irrigation, § 111.

to summon a jury to assess damages for condemnation of land, § 111.

to hear and adjust the sheriff's claim for fees, § 111.

to provide a house of refuge, § 111.

to build and complete a public building, § 111.

to renew a ferry license, when they refused from mistake of law, § 39.

Mandamus will not lie when they are called on to act judicially, §§ 111, 112.

Mandamus will be refused, when appeal lies from their action, § 53.

When another remedy is allowed, no mandamus will lie, § 54.

They cannot be compelled to require towns to pay for the wrongful acts of town officers, § 111.

Mandamus not lie to them to enter judgment on a claim against the county, when the matter pending on appeal in a higher court, § 111.

Though they have a discretion about repairing roads, a mandamus will lie if they wholly neglect to repair, § 39.

They have been held to be acting judicially —

in granting a ferry license, when there were two applicants, § 112.

in appointing collectors of taxes, § 112.

in deciding whether a petition was signed by enough legal voters, § 112.

in dismissing a petition for want of prosecution, § 112.

Their attorney cannot make a return to an alternative writ in their stead, § 282.

See COUNTY BOARD (CLERK OF).

## COUNTY BOARD (CLERK OF):

A mandamus will lie to —

- to sign an order on the county treasurer, § 121.
- to transfer records and suits to another county, § 121.
- to issue a tax deed, § 121.
- to put the county seal on a county warrant, § 121.
- to report his fees, § 121.
- to record the acts of the county commissioners, § 121.

It will not lie to correct the records of the county commissioners, § 121.

See COUNTY OFFICERS (MANAGING BOARD).

## COURT, CLERK OF:

Mandamus has issued to compel him —

- to issue a citation, § 86.
- to issue a writ of assistance, § 86.
- to make out a transcript, § 86.
- to receive and file a bond, § 86.
- to furnish copies of his records, § 86.
- to issue an execution, § 86.

but not if the judgment is ambiguous, § 122.

Writ will be refused, when there is another remedy, § 122.  
when suit on his bond will compensate, § 122.

Writ generally refused, when his court can compel him to act, §§ 86, 122.

## COURT (DISTRICT OF COLUMBIA SUPREME):

Can issue an original writ of mandamus, § 217.

## COURTS:

Entirely independent of executive and legislative departments, § 91.

Common-law courts issue the writ of mandamus, § 213.

Writ issued by common-law courts of highest original jurisdiction, § 213.

Courts decide what acts are judicial and what ministerial, § 108.

Mandamus runs against inferior courts as to ministerial acts, § 186.

Mandamus lies to inferior courts to compel judicial action, when such action is a duty, § 189.

This writ will issue to such courts —

- to hold terms thereof, § 189.
- to take jurisdiction of a cause when wrongfully declined, § 36.
- to proceed in a cause when it wrongfully refuses, §§ 203, 204.
- to proceed in a cause when it has wrongfully postponed the hearing, § 204.
- to render judgment, if there has been unreasonable delay in so doing after submission of cause, § 204.

Judicial action will be ordered, but will not be controlled, §§ 32, 187.

## COURTS (continued):

Mandamus will not lie to review, reverse or correct errors in judicial acts, § 187.

See JUDICIAL ACTS.

Mandamus will not lie to review interlocutory orders of courts, § 196.

Remedy is by appeal or writ of error, § 196.

See APPEAL.

Interlocutory orders may be reviewed by this writ in Alabama, § 199.

in Michigan, § 200.

in Louisiana, when necessary to prevent irreparable injury, § 198.

If a court on a plea to the jurisdiction dismisses the suit, appeal or writ of error, and not mandamus, is the remedy, § 203.

A court will be compelled by this writ to obey the decree of the appellate court, § 189.

A court will not grant this writ to enforce the process of an inferior court, except in cases of urgent necessity, § 84.

Courts cannot control public funds in the hands of officers against the political power in administering the public finances, § 89.

When action is discretionary, mandamus will not lie to a court, § 33.

A mandamus may run to an inferior court to review its judicial action —

in England to some very subordinate courts, § 39.

when a superior court has supervisory control over it, § 39.

when fraud or prejudice has influenced such action, §§ 40, 41.

When referred to, records of courts should accompany the pleadings in mandamus as exhibits, § 261.

See APPEAL; BILL OF EXCEPTIONS; JUDICIAL ACTS; JUDGMENTS; JURISDICTION; DOCKET; EMINENT DOMAIN; OATHS; RECORDS; SUPERSEDEAS DOCKETS.

## COURTS (APPELLATE):

Unless court has appellate jurisdiction of the matter, it will not by mandamus review the action of another court, § 313.

On appeal in mandamus no new defense can be urged, § 307.

If entitled to writ at the time, judgment will be affirmed, though was not entitled to the writ earlier, § 307.

## COURTS (FEDERAL CIRCUIT):

Can issue mandamus only in aid of a jurisdiction already acquired, § 217.

except by statute against Union Pacific Railway, § 217.

Can issue the writ to district courts only in aid of their appellate jurisdiction, § 217.

Can compel municipalities to levy taxes to pay their judgments, § 217.

Such levy of taxes is merely a mode of enforcing a judgment, § 217.

**COURTS (FEDERAL CIRCUIT) (continued):**

Can issue this writ to all state officers, except judicial, § 219.

Can use the same remedies as the state courts, § 219.

Cannot prevent state courts from controlling their inferior courts, § 220.

Their process cannot be interfered with by state courts, § 219.

As being original process they cannot issue a mandamus —

to compel a register of a land-office to issue a certificate of purchase, § 217.

to make state officers levy a tax to pay bonds, § 217.

to compel a state officer to issue a certificate for taxes improperly paid, § 217.

to compel a postmaster to send matter through the mails at certain rates, § 217.

See **COURTS (STATE); REMOVAL OF CAUSES; TAXES (LEVY OF).**

**COURTS (FEDERAL CIRCUIT OF APPEALS);**

No limitation on appeals as to amount involved, § 308.

**COURTS (STATE):**

Cannot issue this writ to a federal officer, § 219.

Cannot restrain process from a federal court, § 219.

Cannot prevent state officers from collecting a tax, as ordered by a federal court, § 218.

Will not issue a subpoena to appear before a federal officer, § 219.

Can require a state officer to perform any ministerial duty, § 219.

May require a state officer —

to levy a tax to pay a federal judgment, § 219.

to pay a creditor money collected to be paid on his federal judgment, § 219.

to erase certain records as ordered by a federal court in bankruptcy, § 219.

See **COURTS (FEDERAL CIRCUIT); REMOVAL OF CAUSES.**

**COURT (UNITED STATES SUPREME):**

Can generally issue a mandamus only in aid of appellate jurisdiction, § 216.

Cannot issue a mandamus to a state court, § 216.

Will issue this writ to a federal court to set aside the disbarment of an attorney, § 216.

In aid of appellate jurisdiction has issued this writ to federal circuit courts —

to set aside the erroneous dismissal of an appeal, § 216.

to sign a bill of exceptions, § 216.

to reinstate a case improperly dismissed, § 216.

to sign the record of a judgment, § 216.

to allow an appeal, § 216.

to enforce a decree erroneously suspended during appeal, § 216.

Limitations on appeals as to amount involved now removed, § 308.

## CRIMINAL PROCEEDINGS:

Mandamus will issue to interfere in criminal proceedings when necessary to protect civil rights, § 61.

The writ will issue to compel courts to proceed in and dispose of criminal cases, §§ 61, 203.

## D.

## DAMAGES:

Only awarded when statute allows, § 310.

Suit for, bars mandamus, and *vice versa*, § 311.

When suit for, plainly not sustainable, a mandamus has been allowed, § 311.

See WAIVER.

## DEATH:

Abates mandamus with private relator, § 233.

Does not abate mandamus of relator who is an officer, § 233.

Does not abate mandamus when copartners are relators, § 233.

See OFFICERS.

## DEBTS:

Mandamus not lie to compel payment of debts, § 17.

Exceptions, when ministerial officer has money in his hands which it is his duty to pay to party entitled to it, § 18.

to public officers and corporations to enforce a duty imposed on them by law when no other way of collecting, § 19.

Assignee of part of a public debt cannot compel officers to issue a warrant to him, § 111.

## DECISION:

Mandamus not lie to a court to review any decision involving facts, § 187.

## DECREE:

Mandamus refused to enter decree on report of referees, § 187.

Mandamus granted in Michigan to vacate order setting aside a decree, § 200.

Writ lies to enter a decree if case has been heard, § 204.

See EQUITY.

## DE FACTO INCUMBENT:

Generally held, mandamus not lie to remove, § 142.

Must have color of right, § 143.

An office is full *de facto* when the party elected has been admitted to the office, whether the election legal or not, but such illegality must be consistent with honesty of purpose, § 143.

Writ will lie to seat officer if incumbent only holding till his successor is elected, § 143.

See ELECTIONS; QUO WARRANTO.



## DEFAULT:

Party must be in, before a mandamus will issue, § 221.

Threats or determination prior to time not a default, § 221.

Mandamus not lie to set aside a default and inquest, § 187.

*Contra* in Michigan, § 200.

See REFUSAL.

## DELAY:

When delay in acting not unreasonable, mandamus refused, § 70.

Mandamus lies to act with reasonable promptness, § 70.

Writ lies to a court to render a judgment, if unreasonable delay after submission of cause, § 204.

If more time ought to be allowed, writ will be refused, § 73.

Mandamus not lie to pay damages sustained while city hesitates about abandoning condemnation proceedings, § 135.

See LACHES; TIME.

## DEMAND:

Demand to perform duty must precede application for writ, § 222.

Such demand must be specific, § 222.

Demand must be confined to act to be done, § 222.

When an improper requirement added, the latter has been rejected, § 258.

Personal demand not necessary to perform public duties when no one with duty to make the demand, § 224.

In public duties the law makes the demand, § 224.

Demand was considered unnecessary —

when colored children were excluded from public schools, § 224.

when a city council failed to order an election to fill a vacancy among its members, § 224.

when a municipality failed to order the levy of a tax to pay a judgment whereon an execution was returned *nulla bona*, § 224.

when a city failed to order a tax to pay bonds on which the creditor had obtained a judgment, § 224.

Demand should be made when proper mode of performance is doubtful, § 224.

Demand not to be made till time allowed for action has expired, § 226.

Demand may be made before default, if otherwise a failure of justice, § 227.

Alternative writ must state that demand was made, § 257.

If personal demand not necessary, facts must be alleged which so show, § 257.

Demand to levy a tax not stating amount of liability is insufficient, § 257.

See ALTERNATIVE MANDAMUS; ISSUES.

**DE MOLESTANDO (WRIT):**

Mandamus will not take the place of, § 43.

**DEMURRER:**

Lies if mandatory part of alternative writ larger than warranted —  
by the recitals of the writ, § 260.  
or by the statute, § 260.  
or demands several acts all of which cannot be legally required,  
§ 260.

Under early practice concilium took the place of a demurrer, § 288.

Under early practice, if the writ held good on concilium, a peremptory writ issued at once, § 268.

Motion to quash is equivalent to a demurrer, § 268.

In important questions a demurrer was preferred, § 269.

In America a demurrer is allowed to alternative writ, § 270.

Return may also raise legal propositions, as a demurrer, § 270.

If demurrer to alternative writ is sustained, relator may amend,  
§ 271.

If demurrer to alternative writ overruled, a return is allowed, § 272.

Sometimes court requires first to be informed of nature of return,  
§ 272.

Demurrer may be filed to a return, § 285.

Demurrers in mandamus subject to same rules as other demurrers,  
§ 286.

Demurrer to return confesses its allegations, § 286.

Demurrer runs back to first defective pleading, § 286.

If part of return good, judgment on it must be for respondent,  
§ 286.

If demurrer to return sustained, respondent may amend, § 287.

If demurrer to return overruled, generally held relator may reply,  
§ 288.

Demurrer lies to reply taking issue on immaterial questions, § 289.

See **CONCILIMUM**; **MOTIONS TO QUASH**.

**DISBURSING OFFICERS:**

Mandamus lies to pay accounts properly allowed, § 135.

Writ not lie to pay account prior to audit, if such audit required,  
§ 135.

No audit required before paying salaries fixed by law, § 135.

On mandamus to pay properly allowed account, court may investigate legality of claim, but not amount, § 135.

Writ refused if no money on hand, § 135.

Writ will not issue to pay when money received, § 135.

Writ will issue if money exhausted by improper payments, § 135.

Writ will lie to indorse on claim refused for lack of funds, when law requires such indorsement, § 135.

Writ will not lie when discretion allowed to officer, § 135.

## DISBURSING OFFICERS (continued):

Disbursing officer cannot refuse to pay when legislature provides therefor, though state not legally liable, § 135.

Writ not lie to officer who has turned over the funds to his successor, § 135.

If reasonable doubt as to duty to pay, or right of relator to receive, the writ will be refused, § 135.

See PAYMENT; TREASURER; TREASURER (COUNTY); TREASURER (TOWNSHIP).

## DISCRETION OF COURT:

Court has discretion about issuing writ, though *prima facie* right shown, § 62.

Discretion must be sound, guided by law and regular, § 69.

No inflexible rule to govern court's discretion, § 62.

Court will consider the exigency, nature and extent of injury which will follow a refusal, etc., § 63.

Writs will be issued only in cases of necessity, § 67.

The court in its discretion will refuse to issue the writ —

if the duty is vague, § 31.

if the right sought has become a mere abstract right, § 66.

if the act can be of no substantial or practical benefit, § 66.

unless necessary to secure ends of justice or some useful object, § 66.

unless substantial interests or substantial rights are involved, § 66.

if merely to relieve party from effects of his own mistakes, § 66.

unless substantial relief can be given, § 66.

if all available means to attain object desired have not been tried, § 67.

if respondent admits he is willing to do the act desired, § 67.

if the act sought has already been done, § 67.

if the act sought is voluntarily done after the hearing, § 67.

if the proceedings are collusive and fictitious, § 68.

unless good motives and correct actions are shown, § 68.

if action brought to obtain opinion of court on point of law, § 68.  
to determine a fanciful question, § 68.

for curiosity, § 68.

as a mere matter of taste, § 68.

to gratify the relator's spite, § 68.

to direct the general course of conduct of an officer, § 69.

when justice will not be subserved thereby, § 72.

when it will operate harshly, § 73.

when it will work injustice, § 71.

when it will be unavailing, § 75.

when the act is physically impossible, § 75.

**DISCRETION OF COURT (continued):**

The court in its discretion will refuse to issue the writ (continued) —  
to compel a technical compliance with the law contrary to its spirit, § 71.

when respondents can legally nullify it by subsequent action, § 74.

when the respondents have already set themselves in motion, § 70.

when the relator has investigated, authorized or approved of the act complained of, § 68.

Query: will a court compel action after the time limited for performance, §§ 79, 80.

If the act will become possible, the court will extend the time for a return, § 76.

The writ will be refused if the respondent has already gone out of office, § 78.

The court will protect the respondent's rights —

Respondents will not be required to subject themselves to suits for trespass, § 81.

Respondents will not be required to bring suits, unless they are indemnified, § 81.

Parties will not be harassed by suits, § 82.

Writ will be refused, if on account of suits pending it would be oppressive, § 82.

Party will not ordinarily be required to disobey an injunction, § 82.

Courts reluctant to grant this writ, when third parties not before the court may be injuriously affected, § 83.

Writ usually refused, if another tribunal can compel the act desired, §§ 84, 85.

Court will not grant the writ, commanding A. to order B., § 86.

Court will refuse the writ, if there has been unreasonable delay, § 87.

Discretion of court denied, when government is relator, § 88.

**DISCRETIONARY ACTS:**

The writ will not issue, when the officer has a discretion whether or not to do the act, § 110.

See JUDICIAL ACTS.

**DISCRIMINATION:** See COMMON CARRIERS; GAS; IRRIGATION; RAILROADS; TELEPHONES; PUBLIC USE.

**DISFRANCHISEMENT:**

Means removal from membership of a corporation, § 137.

See CORPORATION (PUBLIC); CORPORATOR (PRIVATE CORPORATION).

## DISMISSAL:

A mandamus was refused to compel a court to allow a plaintiff to dismiss his suit, § 196.

A mandamus was granted to compel a court to set aside its dismissal of an appeal from a nonsuit, § 201.

## DOCKET:

Mandamus refused to compel a court to reinstate a cause on its docket, § 187.

Mandamus granted to a court to reinstate on its docket a cause improperly dismissed, §§ 187, 189, 204.

Writ refused in Alabama to compel a court to strike a cause from its docket, §§ 199, 210.

## DOCUMENTS (PUBLIC): See BOOKS (PUBLIC).

## DUTY:

Mandamus lies to enforce obedience to common law, statutes and charters, §§ 13, 31.

Writ lies to enforce duties resulting from office, trust or station, § 13.

There must be a plain dereliction of duty, § 21.

Mandamus creates no new duty, §§ 50, 60.

It issues only to compel the performance of what was a duty without the writ, § 50.

Performance of the duty must be obligatory, §§ 27, 57.

Duty may be mandatory, though in language of statute permissive, § 34.

Character of duty determines how far it may be enforced by the writ, § 29.

Duty must be plain and positive, §§ 57, 158.

Duty must be clearly enjoined by law, § 57.

If the duty under the law is vague, the writ will be denied, § 31.

When a substantial doubt as to the duty, the writ will be refused, § 57.

Such doubt is a doubt by the court after examination, § 57.

Court will decide whether the duty is judicial or ministerial, § 108.

When party has a discretion whether to do or not, the writ will not issue, § 33.

Writ cannot order party to do illegal act, though it was once legal, § 60.

Writ will not issue when law creating the duty has been repealed, § 78.

Writ is generally refused, if respondent has gone out of office, § 78.

Writ will not lie to officer to disregard certain papers filed with him, where there is no law for such filing, § 179.

**DUTY (continued):**

The writ will not lie to count votes cast at an election if there was no law for such an election, § 184.

United States can impose no duty on a state officer, and compel him to perform it, § 219.

See **TERM OF OFFICE; TIME.**

**E.****ECCLESIASTICAL TRIBUNALS:**

In America mandamus does not run to, § 176.

Their judgments conclusive in purely ecclesiastical offenses, § 176.

Private corporations subject to them by charter must obey their decisions, § 176.

Courts will interfere as to such obedience only when property rights involved, 176.

Even then their decrees conclusive, if they had jurisdiction, § 176.

Regularity of proceedings not inquired into, § 176.

Decisions on doubtful and technical affairs conclusive, even though comprising jurisdictional facts, § 176.

**ELECTIONS:**

Mandamus lies to call elections at time fixed by law, § 138.

elections to fill vacancies, § 138.

an election, if election already held, clearly colorable and void, § 138.

An election based on a palpable disregard of law will be ignored, § 143.

Mandamus will not lie to hold an election, if one has already been held, though of doubtful validity, § 138.

Writ will not lie to hold an election, if there is already a *de facto* incumbent of the office, unless no other remedy, § 138.

See **ELECTIONS (CANVASSERS); OFFICES.**

**ELECTIONS (CANVASSERS):**

Mandamus lies to canvass votes cast at an election, §§ 139, 178.

Must canvass all the votes cast, § 179.

May reject ballots void on their face, § 179.

May reject ballots not conforming to the law, § 179.

May correct plain clerical mistakes on the papers, § 179.

Must confine themselves to the papers before them, § 179.

May notice facts of general notoriety, § 179.

Most of their duties are ministerial, § 178.

May decide whether returns received are genuine, § 179.

They have a discretion when meaning of ballot is doubtful, § 179.  
when words in a return are uncertain, § 179.

Surplusage in election returns should be rejected, § 179.

**ELECTIONS (CANVASSERS) (continued):**

Surplusage in returns cannot be used to contradict them, § 179.

The uncertainty must be great to justify the rejection of a return, § 179.

In mandamus proceedings courts will not hear evidence of facts respecting a return, § 180.

Such evidence was once allowed, § 180.

Matters of general notoriety have been considered, § 180.

Mandamus lies to declare result of an election, § 181.

Mandamus lies to issue a certificate of election, §§ 140, 183.

Immaterial that a certificate has already been issued, § 140.

Courts try to sustain election returns, § 179.

State officers must canvass returns of congressional elections, § 183.

Peremptory writ will specifically direct what to do, § 183.

to count votes, § 183.

to omit votes, § 183.

Mandamus lies to determine result of election by lot when the law so provides, § 181.

When canvassers are allowed judicial functions, the writ will not lie, §§ 140, 184.

Writ not lie when adequate remedy by appeal or contest, § 184.

to count votes if office already legally filled, § 184.

to count votes if no legal authority for an election, § 184.

May be required to reconvene, though adjourned *sine die*, §§ 52, 185.

though some members gone out of office, § 185.

but not when term has by law expired, §§ 77, 185, 241.

Cannot be reconvened for any purpose if law creating has been repealed, §§ 78, 241.

Will not be required to recanvass votes if term of officer elected has already expired, § 77.

Writ may issue to successors if they can discharge the duties, § 185.

See OFFICES.

**ELIGIBILITY:**

When title to office not triable in a mandamus, the question of relator's eligibility to the office cannot be raised, § 153.

**EMINENT DOMAIN:**

When parties have such rights, a mandamus will run against them, §§ 27, 27a.

Writ issued to county officers to summon jury to assess damages for land condemned, § 111.

Writ issued to court to appoint commissioners to condemn land and assess damages, § 189.

Writ not lie to city to pay damages accruing from delay in condemnation proceedings, till judgment obtained therefor, § 135.

Writ lies to appoint appraisers to assess the damages from a right of way, § 109.

**EMPLOYEE:**

Mandamus refused to enforce contract with public board, § 16.

**EQUITY:**

Mandamus will not issue from court of, § 3.

Writ never granted to enforce equitable rights, § 56.

Equitable transferee cannot by mandamus compel transfer of stock on books of the corporation, § 56.

Equitable remedy no bar to a mandamus, § 55.

Remedy in equity appeals to discretion of court about issuing a mandamus, § 55.

When cause pending in equity, and such court better adapted to settle the rights of the parties, this writ will be refused, § 82.

Bill in equity, asking an injunction against a mandamus, will not be received as a return therein, § 281.

Writ not lie to court to conform to equity rules in a pending cause, §§ 187, 196.

Writ refused to grant a rehearing in an equity case, § 187.

Writ not lie to equity court to dismiss a cause, as parties agreed to do, § 210.

Writ granted to chancellor to order money restored after the decree was reversed on appeal, § 189.

In Michigan will only interfere in equity in extreme cases, § 200.

**ERROR (WRIT OF):**

Mandamus cannot be used as a writ of error, § 313.

If informal, remedy is motion to vacate, and not mandamus to enforce decree, § 201.

Mandamus not lie to review decree, merely because writ of error not allowed, § 202.

Whether, in mandamus proceedings, appeal or writ of error lies, depends on local statutes, § 306.

See **APPEAL**; **APPEAL IN MANDAMUS PROCEEDINGS**

**EVIDENCE:**

Mandamus not lie to receive evidence already rejected on trial of cause, §§ 187, 196.

**EXCEPTIONS: See BILL OF EXCEPTIONS.****EXECUTION:**

Writ refused to vacate order setting aside an execution, § 187.

to set aside dismissal of rule to show cause why execution should not issue, § 201.

Writ refused to vacate stay of execution, when property already levied on in another suit, § 187.



**EXECUTIVE OFFICERS:**

If refuse to act at all, mandamus lies to compel action, § 32.

Creditors of a state cannot by a mandamus assume to exercise a supervising control of treasurer and auditor in conduct of their offices, § 66.

Writ issues to all executive officers, outside of the governor, § 99.

Writ not granted in Texas or Minnesota to head of any executive department, § 102.

When head of department is acting as agent of the governor, this writ will not run to him, unless it will against the governor, § 99.

See AUDITOR OF STATE; COMPTROLLER OF STATE; GOVERNOR; SECRETARY OF STATE; STATE LAND OFFICE (COMMISSIONER); STATE TREASURER.

**EXECUTIVE OFFICERS (UNITED STATES):**

Mandamus lies, if officer refuses to take any action, § 101.

Writ lies to compel officer to obey decision on appeal of superior appellate officer, § 101.

Writ not lie relative to ordinary discharge of official duties, § 100.

to issue a patent for public lands, § 100.

to reverse a decision refusing an increase of pension, § 100.

to pay amount allowed claimant by another department, § 100.

to pay claimant amount received from foreign government in satisfaction of claim, § 100.

Writ not lie to re-issue a patent to an assignee after deciding not to be a proper assignee under the law, § 100.

Writ will issue to all federal executive officers, except when acting as political or confidential agent of the president, § 99.

See SECRETARY OF INTERIOR; SECRETARY OF STATE; PATENTS (COMMISSIONER); PENSIONS (COMMISSIONER); POSTMASTER-GENERAL; PRESIDENT.

**EXHIBITS:**

Documents of importance should accompany petition as exhibits, § 261.

Records of courts should appear as such, § 261.

Usually charters and by-laws of private corporations accompany a petition to restore an expelled member or the return, § 261.

Bill of exceptions should accompany a petition to compel its signing, § 261.

**EXPULSION:** See CORPORATIONS (PUBLIC); CORPORATORS (PRIVATE CORPORATIONS).

## F.

## FALSE RETURN (ACTION FOR):

Relator allowed an action for a false return to the alternative writ, § 268.

Such action to be brought in the king's bench, § 268.

Judgment necessary first on the sufficiency of the return, § 268.

If relator won the suit, a peremptory writ issued at once, § 268.

If a corporation was the respondent, the action might be brought against it or against any particular corporator, § 268.

Such action now obsolete, § 268.

## FRANCHISES:

Mandamus runs against those holding public franchises, § 27.

Must first have assumed the franchises, if not obligatory to do so, § 27.

## FUNCTION:

Writ issued in England to protect a function, § 21.

If emoluments attached, stronger disposition to issue the writ, § 21.

In America, such function must be associated with public rights or offices, § 22.

Some exceptional rulings, § 22.

The writ issues to protect a function when statute so provides, § 22.

See PUBLIC FUNCTIONS.

## G.

## GAS:

Mandamus will issue to furnish gas upon payment therefor, § 162.

## GOOD FAITH:

Mandamus will be refused, unless there is a serious contest, § 66.

Relator must satisfy court that application *bona fide* and for good purpose, § 68.

Writ will be refused, if proceedings tainted with fraud and corruption, § 69.

illegality, § 69.

Writ to issue an execution will be refused, when really brought to contest the legality of the consolidation of two cities, § 69.

See DISCRETION OF COURT.

## GOVERNMENT:

May always have the writ when asked in matters *publici juris*, § 88.

Legislative, executive and judicial departments entirely independent, § 91.

This writ never runs against the government, § 89.

Writ not granted, if government a necessary respondent, § 89.

## GOVERNMENT (continued):

This writ will not issue against the government by indirection by issuing it against public officers, § 89.

Writ has been refused to compel the government —

to make a contract, § 89.

to fulfill its contract, § 89.

to deliver the laws to public printer to print, § 89.

to pay out money in advance of an appropriation, § 89.

to pay over proceeds of a tax to the county treasurer, § 89.

to pay certain claims after money otherwise appropriated, § 89.

Courts cannot control public funds in the hands of officers against the political power in administering governmental finances, § 89.

Officer cannot refuse to pay over funds when the government is willing, § 90.

Writ not granted when government is a necessary respondent, § 89.

Whether the government has impaired the obligation of its contract with the relator cannot be inquired into in a mandamus proceeding against its officer, where government not a party, § 105.

Government appears in such proceedings by its law officer, §§ 229, 230.

In mandamus proceedings by the government, a municipality cannot urge as an offset a debt due to it from the government, § 89.

A mandamus cannot issue from a federal court to a state, directly or indirectly, § 98.

## GOVERNOR:

Decisions vary as to whether this writ will run against a governor, §§ 93, 94, 95, 96.

This writ has been issued to a state governor —

to commission officers, § 93.

to draw a warrant for salary, § 93.

to issue state bonds to a corporation, § 93.

to authenticate a bill, § 93.

to issue a proclamation, § 93.

to sign a patent for land, § 93.

to perform a duty with other officers, § 93.

to perform a duty which might have been imposed on others, § 93.

*contra*, § 94.

when he voluntarily submits to court's jurisdiction, § 94.

*contra*, § 94.

Deductions from the decisions, § 97.

This writ can issue from a federal court to a state governor, § 98.

This writ will not lie in a federal court to a state governor, when it is really against the state, § 98.

If the governor is made a co-respondent, when such writ is not allowed to issue against him, the writ will be dismissed, § 234a.

See EXECUTIVE OFFICERS.

## GUARDIAN:

Mandamus lies to a court to appoint a guardian for a *non compos* defendant to a suit, § 189.

## H.

## HABEAS CORPUS:

Mandamus lies to court before whom a prisoner is brought on *habeas corpus*, to hear the evidence, § 204.

Mandamus refused to court to hear application of party for a *habeas corpus*, when it has already heard him on an application for bail, § 189.

Mandamus refused to make a court issue a writ of *habeas corpus*, § 187.

*Contra*, 189.

When party committed for contempt in mandamus proceedings, wherein the court had no jurisdiction, *habeas corpus* lies to release, § 302.

## HARBOR:

Writ lies to pay the expenses of the construction of a public harbor, § 129.

## HIGHWAYS:

Mandamus lies to officials to perform their duties relative to highways, § 116.

Such duties are included as laying out a road or opening a highway, § 116.

Writ lies to keep streets and roads in repair and to remove obstructions therefrom, § 116.

Writ lies to furnish road overseers with necessary implements, § 111.

Writ lies to grant an application to establish a private road, § 116.

Writ lies to draw a warrant for damages caused by constructing a road, § 114.

Writ will not lie when the duties are discretionary, § 116.

This writ will not lie when the law has provided another remedy, § 116.

Officers will not be required to commit a trespass, § 116.

Officers will not be required to subject themselves to an action for trespass, §§ 81, 116.

Will not be required by this writ to lay out a highway when the proceedings have been stayed by *certiorari*, § 57.

Will not be required to open a highway which their predecessors laid out without authority, § 60.

Though discretion granted as to repairs they cannot wholly be neglected, § 39.

An alternative mandamus to open a road should so describe it that it may be thereby identified, § 256.

See BRIDGES (PUBLIC).

## I.

## INDICTMENT :

Is not generally considered a bar to a mandamus, § 53.

Writ granted to set aside order quashing an indictment alleged not to be properly found, § 201.

## INJUNCTION :

Contrasted with a mandamus, § 43.

Court will not by mandamus compel a party to disobey an injunction unless it was collusively obtained or is plainly void for want of jurisdiction, or such action is necessary to protect a party's rights, § 82.

This writ does not lie to compel a court to grant an injunction, § 187.

*Contra* in Louisiana, Arkansas and Michigan, §§ 197, 198, 200.

This writ does not lie to compel a court to set aside an injunction, § 196.

*Contra* in Alabama and Michigan, §§ 199, 200.

Court will not be compelled by this writ to try a cause when an injunction against its prosecution has been granted, § 204.

An injunction issued against the further prosecution of a mandamus suit will be disregarded, § 312.

## INSIGNIA :

May be obtained by mandamus by one entitled to the office, §§ 154, 155.

The holder of the commission is entitled to the insignia of office, § 142.

## INSPECTION :

Mandamus lies to obtain inspection of public books and papers, § 155.

See BOOKS (PUBLIC).

Mandamus lies to obtain inspection of books of a private corporation, § 161.

See BOOKS (PRIVATE CORPORATION).

## INTERLOCUTORY PROCEEDINGS : See COURTS.

## INTERVENOR :

Mandamus refused to compel court to allow party to intervene, § 187.

See THIRD PARTIES.

## INTRUDER :

Mandamus granted to restrain from interfering with discharge of duties, § 150.

*Contra*, § 43.

## IRRIGATION :

Mandamus runs to party holding right to appropriate water for irrigation, § 27.

Writ issued to irrigation company to furnish water, § 162.

Writ issues to county court to fix rates for water for irrigation, § 111.

## ISSUES :

When law dispenses with necessity of demand and refusal to perform duty, the allegation thereof and denial thereof in return raise no issue, § 224.

## J.

## JAIL :

Sheriff may have a mandamus to obtain possession, § 155.

## JUDICIAL ACTS :

Definition of a judicial act, §§ 30, 31, 32, 187.

Mandamus not lie to review decision on judicial acts, §§ 32, 37, 187.

Courts, not the officers, decide whether the acts judicial or ministerial, §§ 31, 108.

Decision, to be a judicial act, must be on the law or facts legitimately involved in the question, § 31.

If doubtful, mandamus will not lie to review action, § 31.

Federal rule as to the use of this writ, § 31.

When facts creating the discretion are admitted, the act ceases to be judicial, §§ 30, 48.

Mandamus has been allowed to review judicial action —

when decision reached under misapprehension of law, §§ 38, 39.  
in England as to acts of inferior courts, when the errors of judgment were apparent on their records, § 39.

when a supervisory control by mandamus was conferred over such tribunal, § 39.

when conclusion reached was due to matters of fact not involved in the discretion allowed, or to mistakes of law not germane thereto, §§ 38, 39.

when fraud, passion, adverse interest or prejudice has influenced the decision, §§ 40, 188.

The abuse of discretion must be flagrant to allow a review by mandamus, § 41.

Proof of abuse of discretion must be clear and convincing, § 41.

Though an act be judicial, that is no excuse for non-action, § 34.

The party or tribunal will be required to take action, §§ 29, 32, 189.

The decision will be left to such party or tribunal, § 29.

Such party has no right to so act as to defeat a mandatory law, § 35.

**JUDGE:**

Cannot issue this writ in vacation of court, § 213.

**JUDGE (COUNTY):**

Required by this writ to appoint appraisers to assess damages for right of way, § 103.

**JUDGE (PROBATE):**

Mandamus lies to compel issue of his warrant, § 109.

**JUDGMENT:**

Mandamus lies to render judgment if an unreasonable delay in doing so after cause has been heard, § 204.

Judgment must be rendered in reasonable time after cause submitted, § 204.

Writ lies to enter, when court cannot set aside or grant new trial, § 189.  
on alternative verdict according to election of plaintiff, § 189.  
in a criminal case and to pass sentence, § 189.  
on report of referee, § 189.

Writ lies to sign, § 189.

to correct, when erroneously entered, § 189.

to execute the sentence of the court, § 189.

Ordinarily this writ not allowed to enforce a judgment, § 130.

Writ runs to enforce judgments against public corporations, since no other remedy allowed, § 130.

In such cases cannot allege that respondent was not entitled to the judgment, § 131.

In such cases, respondent cannot urge any defense available in original suit, § 131.

In such cases, when court must go behind judgment to find a right to issue the writ, it cannot decline to recognize, if so, that the claim is void, § 131.

When money collected to pay a judgment, this writ lies to compel payment, § 135.

Writ not lie to compel the granting of a particular judgment, § 187.  
to compel judgment of acquittal in a criminal case, § 201.  
to a court to vacate an order opening a judgment, § 187.  
to a court to enter judgment on a verdict after a mistrial has been entered and the jury discharged, § 187.

Writ does not lie when a final judgment has been granted, § 201.

Writ has been refused, as being final judgments —

to set aside a dismissal for failure to pay costs, § 201.

to amend a judgment, § 201.

to vacate a judgment entered *nunc pro tunc*, § 201.

to set aside order sending cause to another court, § 201.

to compel entry of a judgment for costs, § 201.

to set aside dismissal of rule to show cause why an execution should not issue, § 201.

to compel grant of administration to A. *pendente lite*, § 201.

**JUDGMENT (continued):**

Writ not lie merely because writ of error or appeal not allowed, § 202.

Judgment *non obstante veredicto* may be granted in mandamus, § 292.

When judgment is arrested, relator should apply for judgment against himself, and, when refused, mandamus lies to grant, § 201.

Motion in arrest of judgment in mandamus is allowable, § 292.

Form of judgment for respondents, § 292.

See AWARDS; JUDICIAL ACTS; RECORDS, RES JUDICATA; REMOVAL OF CAUSES; TAXES (LEVY OF).

**JURAT:** See AFFIDAVIT.

**JURISDICTION:**

Common-law courts issue this writ, § 213.

When writ issued to an officer, original jurisdiction is exercised, § 214.

When writ issued to a court, appellate jurisdiction is exercised, § 214.

Often jurisdiction only allowed in aid of appellate jurisdiction, § 215.

Appellate courts often refuse writs, when other courts can issue them, § 215.

When judgment of justice appealed, such court can determine its jurisdiction over the appeal, and a mandamus to justice to issue execution will be refused, § 212.

See COURTS; COURTS (APPELLATE); COURTS (FEDERAL CIRCUIT); COURT (UNITED STATES SUPREME).

**JURY:**

Statute of 9 Anne provided for trial by jury of issues of fact, § 290.

Rulings in America not uniform as to right to a jury trial, § 290.

Parties may waive a jury, § 290.

Appellate courts generally send issues of fact to lower court for jury trial, § 290.

When no issues of fact a jury will not be granted, § 290.

**JUSTICE:**

Courts try to make this writ a means of substantial justice, § 66.

**JUSTICES:**

Not required in England to issue distress warrant if threatened with an action therefor and no indemnity offered, § 81.

Not required in England to sue officer on bond, when no provision has been made for their costs, § 81.

See DISCRETION OF COURT; TRESPASS.

**JUSTICES OF THE PEACE:**

Mandamus lies to, to perform ministerial duties, § 212.

Writ lies to, to take action in judicial matters, § 212.



## JUSTICES OF THE PEACE (continued):

- Writ has been issued to justices of the peace, § 212.
- to issue summons against parties, § 212.
- to allow a change of venue, § 212.
- to hear and determine informations brought before them, § 212.
- to hear an appeal, § 212.
- to assess damages on dismissal of a replevin, § 212.
- to render judgment on verdict of jury, § 212.
- to proceed and hear preliminary examination of accused, § 212.
- to render a judgment of dismissal, § 212.
- to tax costs on dismissing a suit, § 212.
- to make correct entries in docket, § 212.
- to allow a garnishee to be examined, § 212.
- to make a true record of the judgment, § 212.
- to make up the record in due form, § 212.
- to furnish a copy of judgment, § 212.
- to issue execution on judgment, § 212.
- to issue writ of restitution, § 212.
- to sign a bill of exceptions, § 212.
- to grant an appeal, § 212.
- to approve a proper bond, § 212.
- to issue *supersedeas* of execution, § 212.
- to keep office in proper precinct, § 212.
- Mandamus not lie, when justice allowed a discretion, § 212.
- Writ not lie, when case has been appealed from him, § 212.
- when he has no longer jurisdiction over it, § 212.
- to levy penalty of a conviction, when no law to sustain such conviction, § 212.
- Justice will not be required by this writ to perform any act rendering him liable to an action therefor, § 212.
- See TRESPASS.

## L.

## LACHES:

- On account of delay in applying for writ, the court may refuse it, § 87.
- Such delay must first be satisfactorily accounted for, §§ 87, 314.
- Court will consider all the circumstances, § 87.

## LAWYERS: See ATTORNEYS.

## LEGISLATURE:

- Is entirely independent of the judiciary, § 91.
- Mandamus will not run against, § 107.
- Writ not lie to correct their minutes, as filed by their officers, § 107.
- Writ not lie to secretary of a territory to alter the proceedings of its legislature as filed with him, § 107.

**LEGISLATURE (continued):**

Writ refused to speaker of legislature to send a bill to the senate when the house had sustained his decision that the bill had not passed, § 107.

When writ asked to enforce rights of member of legislature, the court will decide who was elected such, provided no contest pending in legislature, § 107.

This writ was issued —

to speaker of legislature to certify to a member's account, § 107.

to speaker of legislature to certify to the election or appointment of officers by the legislature, § 107.

to speaker of legislature to open and publish the returns of the election of state officers, § 107.

to secretary of state to file election returns with the speaker of the legislature, and the court decided which body was the true legislature, § 107.

The courts cannot control by mandamus public funds in the hands of officers against the political power in administering public finances, § 89.

Can decide when property is devoted to a public use, § 26.

**LICENSES:**

When officer has no discretion, compelled by mandamus to issue license, § 119.

When discretion allowed, officer's decision will not be reviewed by this writ, §§ 81, 119, 313.

Discretion allowed, when sufficiency of bond must be determined, § 119.

when applicant must be properly recommended, § 119.

when diploma required from institution in good standing, § 119.

Writ will not issue —

when the right to a license has since been taken away, § 77.

when such business has since been made illegal, §§ 60, 119.

Writ has been issued because of refusal of license from mistake of law, § 39.

If the taxes on licenses has been increased prior to the granting of the license, the relator must pay it, before the writ will issue, § 119.

The petition must allege facts showing compliance with the law, § 256.

Discretion granted will be reviewed, when decision influenced by fraud, passion, adverse interest or prejudice, § 40.

**LIMITATIONS (STATUTE OF):**

Generally does not apply to these writs, § 314.

Courts by analogy adopt it relative to mandamus, § 314.

Writ will be refused if statutory period has passed, when court acts, though application made in time, § 314.

Not apply, when government officially asks for writ, § 314.

## LOUISIANA:

To prevent irreparable injury, writ lies to review interlocutory orders of the courts, § 198.

## M.

## MANDAMUS:

Definition, § 1.

Origin, § 2.

Common-law writ, §§ 2, 3, 213.

Prerogative in England: a writ of right in America, § 62.

Extension of uses of in England, § 8.

Uncertainty as to limits of use, § 9.

Only used in extraordinary cases, § 12.

Laws extending operation to be strictly construed, § 12.

Agreement of parties not extend its use, §§ 13, 17.

How far confined to public rights, § 21.

Lies though multiplicity of acts required, § 31.

Not lie to regulate whole course of conduct, § 31.

Lies to courts to take jurisdiction, when wrongfully declined, § 36.

Not lie to undo what has been done, § 42.

Not lie when anything remains to be done or fact to be ascertained, § 42.

to abstain from a tort or abuse of office, § 43.

to prevent others from interfering with officer, § 43.

to prevent one claiming to be elected from qualifying or from acting, § 43.

Only protects substantial interests, § 49.

Denied when there are other remedies, §§ 10, 209.

May issue, though but one step, and may require other proceedings, § 55.

Is entirely a civil remedy, § 61.

Lies only to protect property or prevent infringement of personal rights, § 60.

Lies to pass on real contests, enforce or protect specific rights and redress actual wrongs, § 66.

Cannot take the place of appeal or writ of error, §§ 201, 313.

Can include only one case, § 232.

Basis a suit for damages, § 311.

See MOTION FOR MANDAMUS; MONEY; REMEDIES.

MANDATORY ACTS: See STATUTES.

## MAYOR:

Writ issued to, to sign order to pay a claim against the city, § 109.

to sign a contract for the city, § 109.

to countersign the comptroller's warrant, § 109.

to issue and sell city bonds, § 109.

Writ not lie to, to lease lands when allowed a discretion, § 110.

Will not be required to act after abolition of municipality, § 241.

**MICHIGAN:**

Interlocutory orders of courts may be reviewed by mandamus, § 200.

**MINISTERIAL ACTS:**

Definition of, §§ 30, 31, 186.

Mandamus lies to compel performance of, § 29.

Courts will decide whether duties are ministerial, § 108.

Writ lies relative to such acts to all public officers and public corporations, § 108.

Courts will ascertain the specific duty and will specify the exact mode of performance, §§ 29, 31, 186.

See PRELIMINARY QUESTIONS.

**MONEY:**

Writ refused to compel deposit of public money according to contract, § 16.

Writ refused to recover money misapplied by a public officer, § 17.

Will writ be refused, unless monetary interests are involved, §§ 49, 167.

Weight of authority is that monetary interests not necessary, § 49.

Writ issued to county officers to set apart certain funds for specific purposes, § 111.

See CORPORATORS (PRIVATE CORPORATIONS).

**MONOPOLY:**

When a monopoly is granted, mandamus lies to enforce duties imposed, § 27.

**MOTION IN ARREST OF JUDGMENT: See JUDGMENT.****MOTION FOR A MANDAMUS:**

First proceeding is a motion for a mandamus, § 245.

Some courts require leave to be obtained to be allowed to make the motion, § 245.

Usual practice is to file a petition containing all the averments necessary in order to have the writ granted, § 245.

Such motion must be supported by affidavit, §§ 245, 246.

Affidavit and petition need not be separate papers, § 246.

A written motion beside the petition not usual, §§ 245, 249.

Motion is usually heard *ex parte*, § 249.

Upon hearing the motion court may grant a motion to show cause why a mandamus should not issue, an alternative writ, a peremptory writ, or may dismiss the proceedings, § 249.

If upon the hearing a *prima facie* case is presented, or the right to the writ is doubtful, court usually grants a motion to show cause or an alternative writ, that the matter may be more fully investigated upon the appearance of the respondent, § 250.

See AFFIDAVIT; ALTERNATIVE WRIT; ORDER TO SHOW CAUSE; PEREMPTORY WRIT; PETITION; TITLE.

**MOTION FOR PEREMPTORY WRIT:** See **PEREMPTORY WRIT (MOTION FOR)**.

**MOTION TO QUASH:**

Lies to the alternative writ, § 267.

Is equivalent to a demurrer, § 269.

It lies to the alternative writ, if —

it is informal or defective, § 269.

if its mandatory part is larger than warranted by its recitals or by the law, § 260.

if it varies in substance from the order of the court, § 262.

It admits as true only allegations well pleaded, § 269.

Does not admit matters of law, legal conclusions, or statutory construction, § 269.

May be used to meet mere formal defects, § 269.

Defects of substance may be urged at any time, § 269.

If overruled, under early practice a peremptory writ issued, § 268.

If overruled, under present practice a return may be filed, § 272.

If sustained, under early practice the proceedings were dismissed, § 268.

If sustained, under present practice the relator may amend, §§ 271, 294.

This motion also lies to the return, if defective, §§ 268, 285.

When return is evasive or manifestly bad, this motion is used, §§ 268, 284.

If return sets up any good defense, it should not be quashed as a whole, § 284.

If motion overruled, under early practice respondent had judgment, § 268.

If motion overruled, under present practice relator may reply, if necessary, § 288.

If motion sustained, under early practice a peremptory writ issued, § 268.

If motion sustained, under present practice respondent may amend, §§ 287, 294.

See **AMENDMENTS**; **DEMURRER**; **PEREMPTORY WRIT**.

## N.

**NEW TRIAL:**

Generally, writ refused to a court to grant a new trial, § 187.

Rule different in Michigan, § 200.

**NONSUIT:**

Mandamus not lie to vacate an order setting aside a nonsuit, § 196.

Writ issued to set aside the dismissal of an appeal from a nonsuit, § 201.

Writ issued in Michigan to compel vacation of a nonsuit, § 200.

If a mandamus proceeding is not prosecuted, a nonsuit may be ordered, § 292.

## O.

## OATH:

Mandamus lies to swear an officer elect into office, § 141.

but not if there is a judgment of ouster against him, § 141.

Swearing a party into office confers no right to the office, § 143.

Writ issued to administer an oath of insolvency to a debtor, § 189.

See AFFIDAVIT.

## OFFICERS:

Mandamus lies to any officer to perform any ministerial duty, §§ 21, 108.

Writ not lie against an officer for acts done in an unofficial character, nor in matters where he acts as an individual, §§ 23, 211.

Writ not lie to compel him to pay out money, unless he holds it officially, § 23.

Cannot refuse to pay out public money if the government is willing, § 90.

Writ not lie to direct his general course of conduct, § 69.

Will be compelled by this writ to obey the decision of his superior officer on appeal from him, §§ 81, 101, 109.

Writ issues to an officer —

to take jurisdiction of a matter when he wrongfully declines, § 36.

to issue bonds of a municipality when such is his duty, § 109.

to keep his books in the mode designated by law, § 109.

to swear a party elected into office, § 141.

Generally the writ is refused if another tribunal can compel the performance of the duty desired, §§ 84, 85.

The writ will not be granted to restore an officer to his office —

if he can be immediately suspended or removed regularly, § 74.

if his office is held at the pleasure of others, § 74.

when he may be removed by a majority vote, § 74.

when his position is a mere service, § 74.

The writ will be refused unless there is an officer to do the act, § 59.

The writ will not lie against him if his term of office has expired, § 241.

if his office has been abolished, § 241.

When an officer is the relator his successor can continue the proceedings, § 233.

When he is the respondent courts differ as to whether the writ abates, § 238.

The United States can impose no duty on a state officer and compel him to perform it, § 219.

The alternative writ to restore an officer to office must show that he has the legal and constitutional right to exercise its duties, § 256.

## OFFICERS (continued):

An officer will not be required to commit a trespass or to subject himself to the liability of an action, § 116.

See REMOVAL FROM OFFICE; TIME; TRESPASS.

## OFFICERS (PRIVATE CORPORATIONS):

Mandamus lies to them to discharge their duties, § 165.

Writ issued to them —

to put the corporate seal to papers, § 165.

to pay interest on stock, as law required, § 165.

to deliver the corporate books to their successors, § 165.

to call an election of their successors, § 165.

An unreasonable postponement of an election is equivalent to a refusal to call it, § 165.

Corporation can remove them for adequate cause, § 173.

Mandamus to restore a removed officer will not be granted —

unless tenure of office is permanent, § 173.

or when a majority vote may remove, § 173.

or when good cause for removal, though done irregularly, § 173.

When removal is discretionary, officer is not entitled to a hearing, § 173.

Writ will not lie to fill an office therein, while there is a *de facto* incumbent, § 173.

Writ will run to them to pay the taxes levied on corporate stock, when there is no other remedy to collect them, § 19.

## OFFICES:

Most courts refuse to try title to an office by mandamus, §§ 104, 142.

Writ not granted to put into office, when there is a *de facto* incumbent, § 143.

Writ lies for office, if incumbent holding only till election of successor, § 143.

if party holding by an election or appointment, merely colorable, § 143.

if it is empty, § 143.

Party, asking a writ of mandamus to obtain an office, should do everything necessary to complete his title thereto, § 143.

A mandamus putting a party into an office confers no right thereto, § 143.

Writ not lie to count the votes cast for an office, if it is legally filled, § 184.

for an office, if the election was held without authority of law, § 184.

A party elected to an office will be compelled to assume its duties, § 145.

See OFFICERS; REMOVAL FROM OFFICE; TITLE.

**OFFICES (REMOVAL OF):**

Writ lies to compel officers to remove their offices to the places appointed therefor by law, § 125.

Unless the law has provided another remedy, § 55.

Writ refused in one instance for laches, § 87.

**ORDER TO SHOW CAUSE WHY ATTACHMENT SHOULD NOT ISSUE FOR DISOBEYING A PEREMPTORY WRIT:**

Relator may show in defense any sufficient cause for his disobedience, § 300.

Such defenses have been considered sufficient —

when county officers returned that they had not levied a tax, because all the money they could levy was required for the necessities of the county, § 300.

when a change of law presented new issues, § 300.

when by agreement of parties the operation of the writ was arrested, § 300.

when the relator was no longer entitled to the writ, § 300.

when the writ was vicious by reason of its defects, § 301.

when the affidavit for attachment was defective, § 301.

when it appeared there was no disobedience, § 301.

**ORDER TO SHOW CAUSE WHY A MANDAMUS SHOULD NOT ISSUE:**

By English practice usually granted first, § 250.

Court fixes time for respondent to make return to it, § 251.

Hearing under it is on the original affidavits and counter-affidavits, § 252.

If an issue of fact presented, an alternative writ should issue, that there may be a jury trial, § 252.

If an issue of law presented and respondent fully heard, a peremptory writ may issue at once, § 252.

If no merit in case, proceedings are dismissed, § 252.

Court will mould it, § 293.

**ORDER TO SHOW CAUSE WHY THE PEREMPTORY WRIT SHOULD NOT BE QUASHED:**

Court may grant, § 297.

Court may quash the peremptory writ, § 297.

if convinced the respondents are unable to obey it, § 297.

if it is in excess of the alternative writ, § 297.

if it is in excess of the rule made absolute on cause shown, § 297.

if convinced it ought not to have been issued, § 297.

if it has since become impossible or improper to obey, § 297.

if it was improperly obtained, § 297.



# ORDER TO SHOW CAUSE WHY RETURN TO PEREMPTORY WRIT SHOULD NOT BE QUASHED:

Court may grant such a rule and pass on the question, § 299.

## ORDINANCE:

Clerk of a village not required to post up an ordinance, when it was repealed before the application for the mandamus, § 75.

## P.

### PARTIES:

The general rule is that the government must be plaintiff, § 264.

The name of party instituting proceedings is added as relator, § 264.

The party against whom the writ is sought is defendant or respondent, § 264.

See GOVERNMENT; PRIVATE PARTIES; RELATOR; RESPONDENT; THIRD PARTIES; TITLE.

### PARTNERSHIP:

Rule that partner cannot sue his copartner does not apply to mandamus proceedings, § 231.

Death of a partner who is a relator with his copartners does not abate the proceedings, § 233.

### PATENTS:

Writ not lie to issue to certain persons for land, when officer allowed a discretion, § 110.

Writ lies to secretary of state to issue for lands, when it is fully prepared and recorded, § 234.

### PATENTS (COMMISSIONER OF):

Writ lies to prepare and present a patent to the secretary of the interior for his signature, § 101.

Writ lies to furnish a copy of a rejected or abandoned application for a patent, § 101.

Writ refused to compel to re-issue a patent to an assignee who, as decided by him, was not such an assignee as the law specified, § 100.

### PAYMENT:

Writ lies to pay relator money declared to be due to relator out of funds in respondent's hands, § 135.

When statute provides for payment out of a certain fund, this writ lies to compel, § 135.

Officer must pay to judgment creditor money collected to pay his judgment, § 135.

Officer can only be required out of funds of such kind as he possesses, § 135.

When a claim is properly audited and a writ is sought to compel its payment, court can examine as to legality, but not as to amount, § 135.

**PAYMENT (continued):**

Writ to pay money due under a contract must specify the exact amount, § 256.

Writ not lie to state officers to pay in absence of an appropriation, § 89.

when state has otherwise appropriated the money, § 89.

State officers cannot refuse to pay out public money, if the state is willing, § 90.

Writ may be refused for laches, § 87.

Writ will be refused to pay out of a certain fund, when a court has decided that such fund was illegally collected, § 135.

See **DISBURSING OFFICERS; TREASURERS.**

**PENSIONS (COMMISSIONER OF):**

Writ not lie to, to reverse his decision on an increase of pension, § 100.

Will be required to obey decision of secretary of the interior on appeal, § 101.

**PEREMPTORY WRIT:**

Only issued without notice in cases of extreme necessity, § 251.

If improperly granted without notice, may be reversed on appeal, § 261.

May issue, if no return to alternative writ, § 266.

Courts are reluctant to issue on a default, § 266.

Issued when return merely an argument against court's power, § 266.

May issue, if return evasive or frivolous, § 284.

Must strictly conform to mandatory clause of alternative writ, §§ 230, 296.

Some courts have only required a substantial compliance with the alternative writ, § 296.

A variance in details from alternative writ has been allowed, § 296.

Cannot be amended, § 294.

If alternative writ is amended, it may be issued in conformity, § 294.

Relator must prove his right to everything he asks, §§ 291, 296.

Relator must not make a broader demand than he is entitled to § 291.

All courts do not now adhere to this rule, § 291.

The claim must be established against all the respondents, § 291.

All issues must first be disposed of, § 295.

Should describe the act to be done with reasonable certainty, § 297.

Nature of the mandatory order, § 321.

If writ does not effect the purpose, an *alias* or *pluries* may issue, §§ 292, 297.

Cause may be continued till the writ can be fully obeyed, § 296.

Court may during continuance issue other orders, § 296.

**PEREMPTORY WRIT (continued):**

Must be fairly and honestly complied with, § 299.

Strictly no return to but obedience, § 297.

See ATTACHMENT; ORDER TO SHOW CAUSE WHY AN ATTACHMENT SHOULD NOT ISSUE; ORDER TO SHOW CAUSE WHY THE PEREMPTORY WRIT SHOULD NOT BE QUASHED; ORDER TO SHOW CAUSE WHY RETURN TO PEREMPTORY WRIT SHOULD NOT BE QUASHED.

**PEREMPTORY WRIT (MOTION FOR ON THE RETURN):**

Merely a substitute for a general demurrer, § 285.

Subject to the same rules as a demurrer, § 286.

The allegations of the return must be taken as true, § 285.

Objections only reached by special demurrer will be disregarded, § 285.

Will not be granted, if any material averment is denied by the return, § 285.

Overruling it is only a refusal to issue writ prior to trial, § 285.

**PETITION FOR WRIT:**

Must contain all the averments necessary for the alternative writ, §§ 245, 262.

Must be supported by affidavit, § 246.

Need not be a separate paper from the affidavit, § 246.

Should be addressed to the court, § 249.

Upon its showing the alternative writ is granted, § 262.

Court will mould the alternative writ so far as relief is concerned, § 262.

Cannot be used to sustain or supplement allegations of alternative writ, 253.

May be used as an alternative writ, in which case subject to the rules of pleading applicable thereto, § 262.

Form of, § 317.

Title of, § 316.

Verification of, § 318.

Illustration of, § 322.

See ALTERNATIVE WRIT; MOTION FOR A MANDAMUS.

**PHYSICIANS: See LICENSES.****PLEADINGS:**

Only one case can be included therein, § 232.

Rules relative to pleadings in civil suits apply, §§ 289, 292.

In pleading an official bond, averments must be made showing its compliance with law, § 256.

Writ refused to court to prevent the filing of a pleading, § 196.  
to allow double pleading, § 187.

to reverse its action in extending time for pleading, § 187.

See ALTERNATIVE WRIT; PETITION; PRACTICE; RETURN; TITLE.

**POLICE BOARD:**

Will not be controlled as to general course of conduct, §§ 69, 120.

Writ issues to revoke order contrary to law, § 120.

to restore policemen wrongfully discharged, § 120.

to pay policemen the salary allowed by law, § 120.

though contract calls for less, § 120.

Writ will not be granted to compel the superintendent of police to do his duty, when the board can discharge him, § 84.

**POLITICAL RIGHTS:**

Are not protected by this writ, § 61.

**POSTMASTER-GENERAL:**

Writ issues to, to credit a contractor with allowances which have been legally determined, § 101.

**PRACTICE:**

The general rules of practice apply to mandamus proceedings, § 292.

A nonsuit may be granted, § 292.

A withdrawal of the return may be allowed, § 292.

A new trial may be granted, § 292.

A motion in arrest of judgment lies, § 292.

A judgment *non obstante veredicto* may be granted, § 292.

An *alias* or *pluries* peremptory writ may be issued, § 292.

All issues must be disposed of before the peremptory writ will issue, § 296.

Cause may be continued till peremptory writ can be fully obeyed, § 296.

Court during such continuance may make such orders as it deems proper, § 296.

**PRELIMINARY QUESTIONS:**

Are they judicial or ministerial, § 44.

English rule, § 45.

American decisions, §§ 46, 47.

Summary of the decisions, § 48.

When court erroneously decides on some preliminary question of practice not to hear a cause, this writ lies to compel to hear, § 207.

**PRESIDENT (UNITED STATES):**

This writ not run against, as to his duties derived from the constitution of the United States, § 92.

**PRIMA FACIE TITLE:**

Party who has received the commission or certificate of election and has qualified has the *prima facie* title to the office, § 154.

Courts disregard groundless assumption of election and pretended exercise of an office, § 154.

Party with *prima facie* title must show he is the officer *de jure*, § 154.

## PRIMA FACIE TITLE (continued):

Such party may enforce his collateral rights though there is an incumbent of the office, § 152.

Such party may have this writ to obtain a certificate of election, § 152.

to have his bond approved, § 152.

to obtain a warrant for his salary, § 152.

to obtain possession of official books, §§ 152, 154.

to obtain the office-room, §§ 152, 154.

Ordinarily, in such cases, question of eligibility to the office is not allowed to be raised, § 153.

Writ is refused if another has the *prima facie* title, § 153.

Writ is refused by most courts when the title to office is involved, § 153.

See OFFICES; TITLE.

## PRIVATE PARTIES:

Mandamus will not run against, § 23.

Writ runs against if he holds official or *quasi*-official position, § 24.  
to obtain public books which he retains after expiration of term, § 23.

if he assumes functions from which public duties arise, § 24.  
as to his property devoted to public uses, §§ 25, 26.

if he holds public franchises, § 27.

Writ will not lie against one who acted as judge by consent of parties, § 193.

The writ was refused against the speaker of an illegal house of representatives, § 23.

PUBLIC CORPORATIONS: See CORPORATIONS (PUBLIC).

PUBLIC DOCUMENTS: See BOOKS (PUBLIC).

## PUBLIC FUNCTIONS:

Writ lies to those assuming public functions by the nature of their business, § 13.

Writ lies to one assuming public functions to discharge the duties thereof, § 24.

See FUNCTION.

## PUBLIC FUNDS:

Officer entitled to custody of public funds may have a mandamus to obtain them, § 134.

Writ lies therefor though the respondent has already paid them over to the wrong officer, § 134.

Writ to pay claims will be refused against municipalities when all their funds are required for necessary expenses, §§ 63, 66.

See PAYMENTS; TREASURERS; DISBURSING OFFICERS.

## PUBLIC RIGHTS:

When involved, make a statute mandatory when in form permissive.  
§ 34.

When involved, writ always granted on public application, § 88.

## PUBLIC USE:

Mandamus lies to control property devoted to, §§ 15, 25, 27.

Legislature decides what is a public use, §§ 15, 26.

Writ not lie if property is withdrawn from such use, §§ 15, 25.

## PUIS DARREIN CONTINUANCE (PLEA):

Allowed as to matters occurring after joinder of issue, § 279.

## Q.

## QUANTUM MERUIT:

Writ cannot be used to recover money under a contract as on a  
*quantum meruit*, § 255.

## QUO WARRANTO:

Is necessary before a mandamus, if there is a *de facto* incumbent of the office, § 143.

When allowable to oust the incumbent from the office, generally held that a mandamus will not issue, §§ 138, 184.

A mandamus to issue a certificate of election has sometimes been refused, when a *quo warranto* was necessary to obtain the office, § 140.

See DE FACTO INCUMBENT.

## R.

## RAILROADS:

Writ lies to as being *quasi*-public, § 27a.

to compel obedience to obligations imposed by law, § 13.

when it accepts a law passed for its benefit, § 13.

Writ not lie to enforce its contract, though required by law to make contract, § 16.

Writ issued to it —

to treat all alike in all respects, § 27a.

to complete its line, § 159.

to restore part of its line which was taken up, § 159.

to construct a bridge over its track, § 159.

to construct a bridge over a river, § 159.

to put a cattle-guard on its track, § 159.

to restore a highway obstructed by it, § 159.

to make crossings on streets over its tracks, § 159.

## RAILROADS (continued):

Writ issued to it (continued) —

- to build so as not to obstruct a stream, § 159.
- to build a depot in a certain place, § 159.
- to resume use of an abandoned station, § 159.
- to receive a tax receipt in payment of fare, § 159.
- to stop its trains at a certain place, § 159.
- to issue commutation tickets, § 159.
- to carry freight for all on same terms, § 159.

The last is not the English rule, § 159.

Nor when the law provides another remedy, § 55.

Writ will be refused to require to summon jury to assess damage to land when road not yet finished and full effects not yet felt, § 73.

Writ refused to compel to do certain acts, when it has exhausted its power to raise money, § 76.

Still writ may be issued, if it voluntarily put itself in that position, § 76.

Inability to do the act is a good answer in proceedings for contempt, § 76.

When it is financially unable to fulfill its duties a *quo warranto*, and not a *mandamus*, has been suggested as the remedy, § 164.

Writ not lie to the receiver of a railroad, since the court can order him, § 84.

See BONDS (MUNICIPAL); CORPORATIONS (PRIVATE); SUBSCRIPTIONS.

## REAL ESTATE:

*Mandamus* not a proper proceeding to determine the title to real estate, § 64.

If title to real estate incidentally involved, court should be satisfied about it, § 64.

RECEIVER: See RAILROADS.

## RECORDS:

Writ issued to court to correct its records according to the facts, § 189.

to enter on its records its refusal to probate a will, § 189.

## REFEREE:

Writ not lie to judge to sign his report, on stipulation of parties, that it should be the judgment of the court and the judge should sign it, § 210.

## REFUSAL:

Refusal to do the duty must precede application for a *mandamus*, § 223.

Must be a clear refusal before the writ will issue, § 223.

## REFUSAL (continued):

In public duty a neglect of performance is a refusal, § 225.

Acts considered in such cases equivalent to a refusal —

A failure to perform on the proper day with no excuse,  
§ 225.

Adjournment of board without acting on claim presented,  
§ 225.

Adjournment of board from time to time without action.  
§ 225.

Long postponement of performance of the duty, § 225.

Failure to levy a tax, though requested, § 225.

Failure for years to levy taxes to pay judgments, § 225.

In such cases must distinctly appear respondent declines to do the act, § 225.

See DEFAULT; ISSUES.

## REGISTER OF DEEDS:

Writ issued to enter satisfaction of a mortgage, § 124.

to allow his records to be copied by authorized officers, § 124.

to record a deed, § 124.

Not required to record a deed not received officially, §§ 23, 124.

## REGISTER OF VOTERS:

Writ lies to register a party entitled thereto, § 178.

to restore to list one improperly stricken off, § 178.

## RELATOR:

In mandamus to enforce private rights the party interested must be relator, § 228.

In private rights, the relator must show some personal or special interest, § 228.

Holder of a warrant, not its drawer, must be relator to compel payment, § 228.

A father is allowed by mandamus to assert his children's rights in the public schools, § 228.

When duty due to government as such, private party cannot be relator, § 230.

As to public duties generally, question whether a private party can be relator, § 229.

The writ has been denied to a private relator —

to order an election for removal of county seat, § 229.

to compel removal of fences from public road, § 229.

to award a contract to him as the lowest bidder, § 229.

The weight of authority is that a private party may be relator as to public rights, § 230.



## RELATOR (continued):

- The writ has been granted to a private relator —
  - to call an election for public offices, § 230.
  - to compel a railroad to restore a highway, § 230.
  - to compel a railway to run its trains to its terminus, § 230.
  - to compel the opening and working of a public road, § 230.
  - to cause the assessment of property for taxes, § 230.
  - to compel the maintenance of a public bridge, § 230.
  - to compel the opening and closing of a public bridge, § 230.
  - to compel the widening of a street, § 230.
  - to compel the issuance of a warrant for the collection of taxes, § 230.
- Public officers may be relators even against their co-officers, § 231.
- All parties in interest may be joined as relators, but it is not necessary, § 232.
- Parties can be joined as relators, when have a common right and are joint sufferers, § 232.
- Where a part of a fund was decreed to each of four parties, they were not allowed to apply jointly for a mandamus to compel its payment, § 232.
- When several officers are turned out of office, they cannot join in a writ to be restored, § 232.
  - in one case they were allowed to join, § 232.
- When an officer is the relator, his successor can continue the proceedings, § 233.
- Death abates the writ in the case of a private relator, § 233.

## REMEDY:

- This writ issues because there is no other remedy, §§ 10, 209.
- To bar the use of a mandamus —
  - such other remedy must be specific, § 13.
  - must be adequate and a legal remedy, § 51.
  - must be speedy, § 52.
- Writ not granted because speedier than other remedy, § 52.
- Writ granted if delay attending other remedy would permit material injury, §§ 52, 198.
- Other remedy is adequate if it compels the performance of the neglected duty, § 53.
- Such remedy must be against the proposed respondents and not against third parties, §§ 53, 184.
- Writ will be granted when law intended it to be available, though another remedy may be used, § 52.
- Such remedy must be a legal remedy, § 54.
- An equitable remedy only appeals to the discretion of the court as to the propriety of issuing this writ, § 55.
- An obsolete remedy is not considered to be a bar, § 54.

## REMEDY (continued):

If it is doubtful whether there is an adequate remedy, the writ issues, § 53.

A writ to pay a claim for salary has been refused, because suit could be brought, §§ 111, 135, 136.

If the law has specifically provided another remedy, the writ will be refused, §§ 55, 116, 194.

A mandamus to issue a certificate of election will not be granted, when the relator is contesting the election by suit, § 153.

A court will not be compelled by this writ to grant an appeal, when the appellate court can grant it, § 209.

A court will not be compelled to approve an appeal bond, when a judge of the appellate court can do so, § 209.

Court in its discretion will refuse the writ, when a cause is pending in another court, wherein the matter may be settled, § 82.

But such suit must be maintainable and must finally settle the matter, § 84.

Ordinarily the writ will be refused, if another tribunal can direct the act to be done, § 84.

Owing to the absence of other remedy, the writ has issued —

to vacate an improper order to produce the party's books, § 201.

quashing an indictment alleged not to have been properly found, § 201.

to set aside the dismissal of an appeal from a nonsuit, § 201.

to review the court's order to a justice to make return of a case appealed, though his fees have not been paid, § 201.

Though there is no other remedy, a mandamus will not lie, when the law intended the action of the officer to be final, § 313.

## REMOVAL OF CAUSES:

Writ not issued by state court to inferior state court to transfer a cause to a federal court, § 220.

A federal court cannot by this writ compel a state court to transfer a cause to it, § 220.

After an order of transfer of a cause to a federal court, a superior state court will not compel the subordinate state court to proceed and try the cause, § 220.

If a transfer has been denied, mandamus lies to such state court to proceed to try the cause, § 220.

Writ will not lie to a federal court to remand a cause erroneously transferred to it, § 220.

In such case remedy is by appeal from judgment, if allowable: otherwise, its judgment is final, § 220.

After a federal court has remanded a cause to a state court, under the statute of 1887, the former court cannot be required by this writ to proceed to try the cause, § 220.

An original mandamus proceeding is not transferable from a state to a federal court, § 220.

## REMOVAL FROM OFFICE:

When a public corporation can remove one of its officers, § 147.

If wrongfully removed, may be restored by mandamus, § 148.

Courts will pass on the legality of the removal, § 147.

Officer must have opportunity to be heard before removal, § 147.

Record of removal should show the proceedings, § 147.

When authorized parties have investigated and removed, courts will not re-investigate the charges, § 147.

Suspension from office equivalent to removal from office, so far as the use of this writ is concerned, § 148.

When *quo warranto* is considered to be the proper remedy, this writ is refused, § 148.

Courts will not grant this writ to restore an officer —

when the office is held at the pleasure of the respondents, § 149.

when the relator can be regularly removed for the same causes, § 149.

when party not ousted, but merely intruded upon, § 150.

The writ will not be granted to compel the removal of an officer from his office, when such action is discretionary with respondent, § 151.

See OFFICERS.

## REPLEVIN:

Is not an adequate remedy to obtain possession of public books or documents, §§ 103, 154.

## REPLY:

Formerly not allowed to return, § 4.

Allowed by statute of 9 Anne in some cases, § 5.

Allowed by statute of 1 William IV. in all cases, § 5.

New allegations of return may be always traversed, § 288.

Traverse to return should be single, direct and positive, § 288.

Should traverse or confess and avoid facts set up in return, § 288.

Should not re-affirm allegations of writ not answered by return, § 288.

If return merely a denial of allegations of writ, no reply required, § 288.

Reply, taking issue on immaterial questions, is bad on demurrer, § 289.

An evasive reply may be treated as admitting the facts charged, § 288.

Reply and subsequent pleadings subject to general rules of pleading, § 289.

An illustration, § 322.

## RES JUDICATA:

A judgment in mandamus on the merits is a bar as to those issues in any legal proceeding, until reversed or set aside, § 315.

## RES JUDICATA (continued):

Such judgment is not a bar when the writ was quashed —

because it was informal, or defective by omission of proper parties or allegations, § 315.

because it did not disclose a proper case for the writ, § 315.

When the court had jurisdiction of parties and subject-matter its judgment in mandamus cannot be attacked collaterally, § 315.

A judgment in mandamus against a county is conclusive as to all matters which could have been set up therein in a bill in equity subsequently filed against it by other inhabitants of the county, § 315.

When to obtain power to levy a tax to pay a judgment on bonds the court must go behind the judgment, it cannot decline to recognize the fact that the bonds are void, § 218.

See JUDGMENTS.

## RESPONDENT:

Party whose duty it is to do the act desired must be the respondent, § 234.

Person having no duty in the premises must not be made a respondent, § 241.

Only those charged with the duty can be joined as such, § 234a.

All charged with the duty must be joined as such, though some willing to act, § 234a.

contrary ruling, § 235.

May be joined as such, if duty to be done by one or other, § 234a.

All parties concerned in separate but co-operative steps leading to one result may, but are not required to, be joined as respondents, § 235.

contrary rulings, § 236.

Cannot be joined if their duties are distinct, § 234a.

If an improper joinder of respondents, writ will be dismissed, § 234a.

Writ not lie if government is a necessary respondent, § 89.

Cannot be if his term of office has expired, § 241.

if his office has been abolished, § 241.

May be, though he has resigned, if resignation does not vacate office, § 239.

Will not issue to a court, acting under a special commission, after its expiration, § 211.

Respondent is proper party to make return to alternative writ, § 282.

If other parties make the return, they are liable to an attachment, § 282.

Court will protect respondent's rights, § 81.

Court will not involve him in doubtful litigation, § 81.

Will not be compelled to be a trespasser, § 81.

Will not be allowed to be harassed by suits, § 82.

See ABATEMENT; CONTEMPT; CORPORATIONS; OFFICERS.

RETURN OF OFFICER: See SHERIFF.

RETURN TO ALTERNATIVE WRIT:

Originally not allowed, § 2.

Corresponds to answer in ordinary suit, § 253.

∞ If not made peremptory writ may be granted, § 266.

If not made may be compelled by attachment, § 266.

May be of obedience to the writ, § 267.

In such case should follow mandatory clause of writ and clearly show obedience, § 267.

Relator may traverse such return as not true or a mere evasion, § 267.

It may state obedience to part of writ and reasons for not obeying other part, § 267.

May deny allegations of alternative writ, § 267.

May set up new matter constituting a defense, § 267.

May be informal, but must contain necessary allegations, § 273.

Once required to have very great certainty, § 274.

Certainty to a common intent is now sufficient, § 274.

Its traverses must be positive, direct, single and special, § 274.

A general denial in it is a nullity, § 274.

Traverses must be confined to statements in writ, § 274.

Return is sufficient if it follows suggestions of writ, § 276.

Cannot deny allegations of writ on information and belief, § 280.

Allegations of writ which it does not notice are taken as true, § 274.

Should show a legal reason for not obeying, § 274.

Must be very minute in showing reasons for disobedience of writ, § 280.

May contain several defenses if consistent, § 277.

Is bad if defenses are inconsistent, unless some are bad, and after they have been quashed the remainder are consistent, § 277.

When some of the defenses are bad in law, they may be quashed, and relator required to plead to residue, § 277.

New facts must be set out positively and distinctly, § 274.

Allegations of must be positive, and not on information and belief, § 280.

Each plea must have certainty as to time, place and persons, § 274.

Construed most strongly against pleader, § 274.

Should not state inferences, §§ 274, 280.

Great certainty required to alternative writ to restore a corporator, § 275.

Cannot consist of a bill in equity asking for an injunction against the prosecution of the writ, § 281.

May plead in bar facts occurring after issue of writ, § 279.

Facts occurring after issue joined may be set up by plea *puis darrein continuance*, § 279.

Need not be verified at common law, § 283.

**RETURN TO ALTERNATIVE WRIT (continued):**

Court may require a verification, § 283.

When verification required, only such positiveness of allegation should be required as party can make, § 280.

Under early practice its allegations of fact could not be traversed, § 268.

Then the remedy was by action for a false return, § 268.

Reply thereto is now allowed, § 268.

May be amended if adjudged defective, § 287.

If evasive or frivolous, may be disregarded or stricken from files, § 284.

May be withdrawn by leave of court, § 292.

Title of, § 320.

Signature to, § 320.

Illustration of, § 322.

See AFFIDAVIT; AMENDMENT; ATTACHMENT; CORPORATOR (PRIVATE CORPORATION); FALSE RETURN (ACTION FOR); RESPONDENT.

**RETURN TO PEREMPTORY WRIT:**

Strictly none save of obedience, § 297.

Sufficient if act is done, though by another, § 297.

Return, that corporator is restored, is sufficient, though he was notified at once of new proceedings to remove him, § 299.

Return, that statute has since forbidden the act or made obedience impossible, is sufficient, § 297.

Prior to a return, court may grant rule to show cause why the peremptory writ should not be quashed, § 297.

If not made, court may issue an *alias* peremptory writ, an attachment, or grant order to show cause why an attachment should not issue, § 298.

See ORDER TO SHOW CAUSE WHY AN ATTACHMENT SHOULD NOT ISSUE FOR DISOBEYING A PEREMPTORY WRIT; ORDER TO SHOW CAUSE WHY THE PEREMPTORY WRIT SHOULD NOT BE QUASHED.

**RIGHT:**

Mandamus only lies to enforce a legal right, § 11.

No legal right, when law provides no remedy for its violation, § 11.

Writ never granted to enforce equitable rights, § 56.

Title must not be inchoate, § 56.

The right must be already established, § 56.

If relator shows no interest in the matter, the writ will be refused, § 66.

Writ denied, if right of relator not clear, though respondent willing to act, §§ 56, 67.

If relator's right expires before hearing, writ refused, 77.

**ROADS:** See HIGHWAYS.

**RULE:** See ORDER.

## S.

## SALARIES:

Mandamus lies to municipal officers to pay, § 136.

Some courts assert a writ is a sufficient remedy, §§ 17, 136.

Party having commission and *de facto* officer may have this writ for, § 105.

Teacher of public school may have this writ for, § 115.

Writ for, lies from date of right, though inducted into office later, § 153.

When salary fixed by law, claim need not be audited, § 135.

See PRIMA FACIE TITLE; WARRANT.

## SCHOOL FUNDS:

Writ lies to obtain payment out of, when payments made by city treasurer on order of school board, § 19.

## SCHOOLS:

Mandamus lies —

to restore scholars improperly excluded, § 115.

to admit scholars improperly excluded, § 115.

to restore teacher improperly removed, § 115.

to compel payment of salaries of teachers, § 115.

to provide enough schools, § 115.

to allow the use of certain text-books, § 115.

to levy a tax to raise the amount of money required for the schools, § 129.

to introduce into the schools the text-books properly adopted, § 115.

to levy a tax to pay for building a school-house, § 129.

Mandamus has been refused —

to transfer a party for school purposes to another town, because an appeal would lie, § 53.

to admit a colored child to a public school, because the father could bring suit, § 53.

to contract for school books, when other books had been illegally adopted and purchased and then in use, § 66.

Writ not granted in such matters, when public interests will suffer, § 115.

Colored children cannot be excluded from public schools, § 115.

Query: Can separate schools be provided for colored children, § 115.

Because of discretion allowed, writ not issue to approve of a school teacher, § 115.

In discretionary matters writ will issue to come to some conclusion, § 115.

Writ will be refused to keep school open, when such period has passed, 77.

A father can assert his child's rights in the public schools, § 228.

**SEALS:**

Writ lies to corporate officers to put corporate seal to official certificates, § 109.

**SECRETARY OF THE INTERIOR:**

Writ not lie to issue a patent for public lands, § 100.

unless already duly signed, sealed, countersigned and recorded, § 101.

**SECRETARY OF STATE (STATE):**

Writ lies to compel performance of a ministerial act, § 102.

Writ has been issued to him —

to allow an account and draw his warrant therefor, § 102.

to publish acts of the legislature, § 102.

to furnish a copy of the laws for publication, § 102.

to attest and record commissions of officers, § 102.

to complete election returns and give certificates of election, § 102.

to revoke the licenses of foreign insurance companies, § 102.

to issue proper notices of election, § 102.

**SECRETARY OF STATE (UNITED STATES):**

Mandamus refused to compel him to pay to claimant money received from a foreign government in payment of a private claim, § 101.

**SECRETARY OF THE TREASURY:**

Writ refused to pay relator amount allowed by another department, § 100.

**SERVICE OF WRIT:**

Writ to be served on the mayor or highest officer of a municipal corporation, § 237.

Writ to be served on highest officer of a private corporation or the body to do the duty desired, § 237.

Mode of service of writ is regulated by statute, § 237.

**SHERIFF:**

As ministerial duties this writ has issued to him —

to put a party into possession of property according to decree, § 123.

to make his return accord with the truth, § 123.

to surrender property he was no longer entitled to hold, § 123.

to appoint appraisers, § 123.

to set out a debtor's exemptions, § 123.

to sell an estate as an entirety, § 123.

to make a deed for property sold by him, § 123.

In the latter case the writ must contain averments showing the sale to have been according to law, § 256.



**SHERIFF (continued):**

The writ has been refused —

when there was a doubt as to his duty, § 123.

to make a deed for property with recitals which were not true, § 123.

to execute a judgment on property when the title was in dispute, § 123.

to deliver over the surplus on a sale for taxes, there being another remedy, § 123.

Writ issues to court to allow him to amend his return, § 189.

Writ not lie to, to produce prisoner, when has already delivered him to other officers, § 75.

**SOCIETIES:**

Mandamus does not run to unincorporated societies, § 157.

**STATE:**

United States can impose no duty on a state officer and compel him to perform it, § 219.

See GOVERNMENT.

**STATE LAND OFFICE (COMMISSIONER):**

Mandamus issues to, to issue patents for lands, § 106.

See EXECUTIVE OFFICERS.

**STATE TREASURER:**

As a ministerial duty this writ lies to him —

to issue certificates of election, § 103.

to issue state bonds, § 103.

to stamp state bonds, § 103.

to surrender to municipality its invalid bonds, § 103.

to pay warrants drawn on him, provided there is an appropriation, § 103.

Writ refused to pay warrant so soon as he has money, § 103.

Writ not lie to disobey instructions of the legislature, § 103.

His decision as to the amount, but not the legality, of a claim is conclusive, § 103.

See APPROPRIATIONS; EXECUTIVE OFFICERS; SALARIES.

**STATUTE OF 9 ANNE:**

Generally adopted in America, § 7.

**STATUTES:**

Duty imposed by statute need not be specifically stated, §§ 13, 27.

Party may put himself in a position subjecting him to such duty, § 13.

May be mandatory, though in form permissive, § 34.

Mandatory when public rights involved, or public or third parties have a right to have the power exercised, § 34.

Officer cannot act so as to defeat a mandatory law, § 35.

**STATUTES (continued):**

A sufficient statutory remedy will prevent issue of a mandamus, § 51.

A public body will not be compelled to violate a penal statute, § 60.

United States can impose no duty on a state officer and compel him to perform it, § 219.

**STOCK (CORPORATION):**

Mandamus to transfer generally refused, § 160.

Allowed under special laws, § 160.

Allowed in England, § 160.

Damages for refusal to transfer not always held an adequate remedy, § 160.

**STOCKHOLDERS: See BOOKS (PRIVATE CORPORATIONS); CORPORATIONS (PRIVATE); CORPORATORS.****STREETS:**

When discretion allowed about improving, mandamus not lie to review decision not to improve, § 110.

When right given to occupy, mandamus lies to fulfill duties imposed, § 27.

Writ not lie to a private corporation to open or keep in repair a street according to contract, §§ 16, 53.

Mandamus to remove obstructions put in a street by authority of a city must show an unlawful use of the street, § 109.

See BRIDGES (PUBLIC); HIGHWAYS; TAXES (LEVY OF).

**SUBPCENA DUCES TECUM:**

Mandamus refused to compel court to punish for disobeying, § 187.

**SUBSCRIPTIONS:**

Mandamus issues to county officers to subscribe to railroad stock as authorized by vote, § 111.

But law must impose the duty to subscribe on such vote, § 128.

In such case tax-payers, but not the railroad, may compel the subscription, § 228.

When subscription once made, writ lies to issue the bonds therefor, § 128.

or to raise the money therefor, as statute may provide, § 128.

A municipal subscription may impose conditions, though the law is silent, § 128.

A proposition by a railroad, accepted by vote of a municipality, becomes a contract if the law so provides, and this writ lies to compel the issue of the bonds upon tender of the stock, § 128.

A compliance with an ordinance by a railroad authorizes a mandamus to compel the city to issue its bonds, if the law makes it its duty then to do so, § 128.

## SUBSCRIPTIONS (continued):

Writ not lie to issue bonds to a railroad already completed, if the law only authorized their issue to assist in completing, § 128.

Writ will be refused to compel a municipality to issue its bonds to a railroad, if bribery was used to control the vote therefor, § 68.

## SUCCESSORS:

A mandamus begun by an officer may be continued by his successor, § 233.

See RELATOR; RESPONDENT.

## SUPERSEDEAS:

In England a peremptory mandamus is not suspended by appeal with indemnifying bond, § 309.

The decisions in America are conflicting, § 309.

Mandamus will lie to carry a decree into effect, when a *supersedeas* is wrongfully granted on an insufficient bond, § 189.

SUSPENSION FROM OFFICE: See REMOVAL FROM OFFICE.

## T.

## TAX SALE:

Mandamus lies to a treasurer to pay to purchaser at tax sale such money as he received on the redemption of the land, § 135.

Writ not lie to make a tax deed, when it will convey no title, § 75.

## TAXES:

Mandamus lies to refund taxes paid under an erroneous assessment, § 111.

to pay taxes on the stock of a corporation when there is no other remedy by which to obtain them, § 19.

Writ will not lie to tax collector for not collecting taxes illegally assessed, § 83.

to place taxes levied on the tax list when they exceed the rates allowed by law, § 60.

Being a judicial act, writ will not lie—

to correct an error in a tax duplicate, § 31.

to a court to increase school taxes, § 187.

to a court to direct its judgment in an application about a tax assessment, § 187.

## TAXES (LEVY OF):

Writ not lie to levy a tax unless the claim is a legal charge, § 130.

Claim must be so established that it cannot be controverted, § 130.

Proof of claim should be equivalent to a judgment or debt of record, § 130.

Unadjusted claims must be first audited, § 130.

If municipal bonds are questioned in law or fact, judgment must first be obtained on them, § 17.

**TAXES (LEVY OF) (continued):**

When liability is doubtful a judgment must be first obtained, § 129.

When liability ascertained mandamus issues to levy tax to pay, § 130.

Writ lies to county officers to settle a claim against a county and to levy a tax to pay it, § 111.

Law may specifically provide for levying a tax to pay a claim without auditing it, § 130.

This writ will issue to levy a tax —

to pay claims allowed by county commissioners, § 130.

to pay judgments, §§ 113, 129, 130.

to pay the expenses of constructing public buildings, § 129.

to pay the expenses of constructing a public harbor, § 129.

to pay for building a school-house, § 129.

to create a fund to pay a certain indebtedness, § 129.

to raise the amount required for schools, § 129.

to pay municipal bonds and interest on them, § 129.

to pay the damages assessed for opening a street, § 129.

to pay the bounties promised to soldiers, § 129.

Writ will not lie unless respondents have legal power to levy the tax, §§ 129, 130.

Writ will not lie if statute requiring the levy is void, § 129.

When money is to be raised as in other cases, a tax may be levied, § 129.

The only power for raising money is by taxation, unless otherwise provided by law, § 129.

Power to create a debt, incur an obligation or to expend large sums of money implies a power to levy a tax, unless otherwise provided, § 129.

The writ must comply with the law as to manner of collecting and amount of the tax, § 129.

Limitation of power to levy must be urged in the original suit and not in mandamus proceedings to levy a tax to pay the judgment, § 218.

Writ lies to levy tax to pay a claim when suit cannot be brought on it, § 130.

Federal courts can compel municipal officers to levy taxes to pay their judgments, § 218.

State officers cannot be compelled to do any act not their duty by state law, §§ 60, 218.

Federal courts must use state officers to levy and collect taxes, § 218.

The collection of taxes cannot be required faster than provided by law, § 132.

The levy must be specifically made for the claim urged and separately, § 132.

A new levy may be ordered without waiting for payment by delinquents, § 132.

**TAXES (LEVY OF) (continued):**

Levies may be ordered for successive years, § 132.

A demand to levy a tax without stating amount of liability is insufficient, § 257.

Writ will be refused when all the money that can be raised is required for the ordinary and necessary public expenses, §§ 66, 132. Court may require a full return of expenses to show such necessity, § 132.

Court will confine expenses of municipality to such necessities, § 132.

A sufficient return to such writ that all the taxes allowed have been levied, § 218.

Writ will be refused when appeal pending and the collection of the judgment is not endangered, § 72.

When suit to recover taxes erroneously paid is barred, a writ to levy a tax to repay money so paid will be refused, § 87.

See **COURTS (FEDERAL CIRCUIT); JUDGMENTS.**

**TELEPHONES:**

Mandamus lies to place telephones in private offices, § 162.

Writ lies to treat all alike in the use of, §§ 25, 162.

**TERM (OF COURT):**

Writ lies to compel the holding of a term of court, § 189.

**TERM (OF OFFICE):**

This writ will not issue to an officer whose term of office has expired, §§ 185, 241.

or whose office has been abolished, § 241.

This writ will not issue to a court acting under a special commission which has expired, § 211.

See **BILL OF EXCEPTIONS; RELATOR; RESPONDENT; TIME.**

**TESTIMONY:**

Mandamus not issue to court to issue order for taking testimony of a prisoner, § 187.

**THIRD PARTIES:**

Court will protect the rights of third parties, § 83.

Writ will be refused if it would involve them in difficulties and hardships, § 83.

Writ will be refused if it might embarrass them in suits, § 83.

May be subsequently introduced into mandamus proceedings if necessary to protect their rights, § 242.

To be allowed to intervene in mandamus proceedings must show that they will gain or lose by the direct operation of the decision, § 242.

They cannot intervene and ask for the determination of other questions, § 242.

If question doubtful let court order that they be made parties, § 243.

**THIRD PARTIES (continued):**

Not allowed to intervene to protect rights which cannot be properly litigated in such proceedings, § 244.

Whether government has impaired the obligation of its contract with the relator by its legislation cannot be inquired into in a mandamus proceeding against its officer, to which it is not a party, § 105.

See INTERVENOR.

**TIME:**

Writ may issue, though time for doing the act has expired, if the law is only directory, § 79.

If the time limited by law for action has expired, the writ will be refused, §§ 79, 185.

Writ has issued after time limited, when respondent alone in fault, §§ 50, 79, 208.

The limitation as to time has been disregarded and the writ issued to prevent injustice, § 79.

If time limited for action in that year has expired, the court may extend the time for a return to cover the period for action in the next year, § 227.

If party neglects to use the proper remedy in the time limited by law, he cannot have a mandamus because now otherwise without remedy, § 201.

**TITLE:**

Mandamus not lie, when the title to the right claimed is inchoate, § 56.

**TITLE TO OFFICE:**

Most of the courts refuse a mandamus to try the title to an office, § 143.

the better rule seems to be otherwise, § 146.

Courts, which refuse by this writ to try the title to an office, refuse to enforce by this writ the collateral rights of the party with the *prima facie* title, when the question of the real title is involved, § 153.

The writ will be granted to try the title to an office, when the law has provided no other remedy, § 143.

When title to offices cannot be considered, the question of eligibility of relator cannot be raised, § 153.

The title has been determined in writs to enforce collateral rights of officer, when no other party was interested in the office, and also when the respondent's lack of title was clear, §§ 153, 155.

See OFFICERS; OFFICES; REMOVAL FROM OFFICE.

**TITLE TO PLEADINGS:**

The affidavit or petition for a mandamus should be entitled of the court, but not of a cause, § 247.

Suggestion that advisable to entitle of a cause, § 247.

## TITLE TO PLEADINGS (continued):

Error in entitling papers must be taken *in limine*, § 247.

After court has taken any action, all subsequent papers filed must be entitled of the cause, § 247.

The proceedings are generally in the name of the government, § 264.

The party instituting the proceedings is the relator, § 264.

The party proceeded against is the respondent, § 264.

Title to petition (form of), § 316.

Title to return (form of), § 320.

## TOWNS:

Writ of mandamus has issued to county officers —

to divide a township, § 111.

to issue warrants to fill vacancies in township offices, § 111.

Writ of mandamus has issued to town officers —

to raise by taxation money to build a school, § 114.

to draw a warrant for the damages for constructing a road, § 114.

to pay the damages for constructing a road, § 116.

to issue a notice for the election of their successors, § 114.

to make a proper division of the assets and liabilities on the division of the town, § 114.

to appropriate a certain proportion of the taxes for schools, § 115.

The writ has issued to the town clerk to amend his records, § 114.

## TREASURER:

Writ not lie to, relative to money not required to officially account for, § 23.

Writ will issue to pay warrants drawn on him if he has funds, § 115.

See WARRANTS.

## TREASURER (COUNTY):

Writ of mandamus will issue to —

to pay the taxes collected to the officers entitled to receive them, § 134.

to issue a warrant for the collection of taxes, § 135.

to assign the certificate of the sale of land for taxes, § 135.

to pay to creditor money collected to pay his judgment, § 135.

to sell lands for delinquent taxes, § 135.

to pay money appropriated by the legislature for a particular purpose to the proper party, § 135.

to pay a judgment against the county, when the county board has resolved not to appeal, § 135.

The writ has been refused —

when clear that the supervisors were imposed on, § 56.

when doubtful whether the applicant was entitled to receive the money, § 56.

because an action lay on his bond, § 53.

See WARRANTS.

**TREASURER (TOWNSHIP):**

Mandamus lies to pay taxes collected to the proper officers, § 134.

Writ lies to issue warrant of distress against tax-collector for neglect to collect and return taxes, § 135.

See **WARRANTS**.

**TREASURER (UNITED STATES):** See **SECRETARY OF THE TREASURY**.**TRESPASS:**

A mandamus will not issue to officers to commit a trespass, § 116.

The writ will not issue, when it may subject officers to an action of trespass, § 116.

See **DISCRETION OF COURT; JUSTICES**.

**TRIAL:**

Is in mandamus proceedings similar to that in any other suit, § 291.

Relator must prove allegations of writ denied in the return, § 291.

Respondent must prove matters in avoidance in return, if denied by relator, § 291.

All issues must be disposed of before the peremptory writ will issue, § 295.

Writ will issue to a court to try a cause, if it wrongfully refuses, § 293.

Writ will not issue to a court to try a cause, when the parties have been enjoined from proceeding therein, § 187.

**TRIAL (NEW):** See **NEW TRIAL**.**TRUSTS (PUBLIC):**

A mandamus lies to enforce, § 21.

**U.****UNITED STATES:**

Can impose no duty on a state officer and compel him to perform it, § 219.

**V.****VENUE (CHANGE OF):**

Writ not lie to a court to grant, §§ 187, 196, 199.  
contrary decisions, § 187, n.

Writ not lie to vacate order allowing, § 201.

Where court was interested, writ issued to court to transfer cause to proper tribunal, § 189.

Writ not lie to compel change of venue, as agreed by litigants, when no law therefor, § 210.

Writ allowed in Michigan to vacate order rescinding order of removal of cause, § 199.

See **JUSTICES OF THE PEACE**.

**VERDICT:**

Mandamus has been granted to a court to receive and enter the verdict of a jury, §§ 189, 199.



**VERDICT (continued):**

Writ refused to make a court set aside a verdict, § 187.

Writ issued in Michigan to a court to set aside a verdict and grant a new trial, § 200.

See JUDGMENT.

**VISITOR:**

His duties are confined to the private laws of the corporation, § 175.

Mandamus will not issue when he has authority and has acted, § 313.

His judgment after a hearing is final, §§ 32, 175.

He alone has power to pass on the laws of the corporation and to hear appeals from the acts of its officers, § 175.

Writ lies to compel him to perform his duty, §§ 32, 175.

Writ lies to compel corporate officers to obey the laws of the land, § 175.

Civil corporations have the government as their visitor, § 175.

The ordinary is the visitor of a spiritual corporation, § 175.

Eleemosynary corporations have the founder and his heirs as visitors, § 175.

**VOLUNTEERS:**

Writ refused to enforce contract of county to pay for volunteers, § 16.

contrary decision, § 129.

**VOTES:** See ELECTIONS (CANVASSERS).

**W.****WAIVER:**

Suit for damages waives the right to a mandamus, and *vice versa*, § 311.

Suit for damages waives the right to be restored as a corporator by this writ, § 171.

**WARRANT:**

Writ lies to auditing officers to issue their warrants on the disbursing officers for accounts properly allowed, §§ 115, 126.

Officer in good faith doubting the right of the relator may refuse to issue his warrant till the court has decided, § 153.

The writ will not be granted to compel an officer to issue his warrant —

to aid in obtaining payment of a private contract, § 16.

when it is doubtful who is entitled to the money, § 56.

until board having authority to compel the issue has refused to act, § 84.

when the appropriation is exhausted, § 105.

for an unliquidated claim, § 105.

when by change of law it is no longer his duty, § 105.

for salary, which has been already paid to the *de facto* officer, § 153.

**WARRANT (continued):**

Whether there must be money on hand, or the writ will not issue, is a disputed question, § 105.

The holder of a warrant, not its drawer, must be the relator in proceedings to compel its payment, § 228.

The alternative writ to compel the payment of a warrant must allege there was sufficient money to pay it when presented, § 256.

The writ lies to any officer whose duty it is to issue a warrant of any nature, §§ 109, 111, 114.

The assignee of a part of a debt cannot compel an auditing officer to issue him a warrant for his interest, § 111.

See AUDITOR; AUDITOR OF STATE; COMPTROLLER OF STATE; PRIMA FACIE TITLE; STATE TREASURER.

**WATER:** See IRRIGATION.

**WILL:**

Mandamus issues to grant the probate of a will, § 204.

Writ issues to grant letters testamentary to the executor, § 189.

Writ issues to call a register's court in probating a will, § 189.

See RECORDS.

**WITNESS:**

In Alabama a writ of mandamus lies to review the action of a court in granting or setting aside an attachment for a witness, § 199.

**WRIT OF ERROR:** See ERROR (WRIT OF).









